121-182

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 977.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES L. DUNN, BY ELLIS STONE GORMAN, HIS GUARDIAN, *AD LITEM*.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ~~MICHIGAN~~ Minnesota.

FILED SEPTEMBER 6, 1886.

182-215

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1 *Appeal from District Court, Ramsey County.*

State of Minnesota, Supreme Court. October Term, 1885.

CHARLES L. DUNN, a Minor, by Ellis Stone Gorman, His Guardian *ad litem*, Respondent,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Appellant.

Complaint.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

District Court, Second Judicial District.

CHARLES L. DUNN, a Minor, by Ellis Stone Gorman, His
2 Guardian *ad litem*, Plaintiff,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Defendant.

The complaint of the plaintiff above named respectfully shows to the court and alleges:

That heretofore, to wit, on the — day of August, 1884, such proceedings were duly had in this court that Ellis Stone Gorman, a citizen and resident of St. Paul, in the State of Minnesota, was duly appointed the guardian *ad litem* of this plaintiff, who is a minor of the age of eight years, and that thereupon the said E. S. Gorman duly accepted said appointment as such guardian *ad litem*, and ever since said date first above named has been, and now is, the duly appointed, qualified, and acting guardian *ad litem* of the plaintiff in this action.

And the plaintiff further alleges that during all the times hereinafter stated the said defendant was, and still is, a railroad corporation, duly created and existing under and by virtue of the laws of the State of Iowa, and lawfully transacting the business of a common carrier of passengers for hire and from sundry points within the States of Iowa and Minnesota, and was during the time aforesaid, and still is, practically engaged in operating as such railway company and as such common carrier of passengers and goods for hire a certain line of railway from Cedar Rapids, in the State of Iowa, to Albert Lea, in the State of Minnesota, as well as divers other lines of railway from sundry points within the State of Iowa to sundry points within the State of Minnesota.

3 And plaintiff further alleges that heretofore, to wit, on or about the 11th day of February, 1884, this plaintiff, Charles L. Dunn, entered into the cars and coaches of this defendant at Cedar Rapids, in the State of Iowa, as a passenger, and therefore, and in consideration of a certain fare then and there paid, to and received by said defendant, said defendant took and received this plaintiff as such passenger upon its railway for the purpose of trans-

porting him, with other members of his family who accompanied him, from Cedar Rapids to said Albert Lea, Minnesota, and to said Minneapolis, Minnesota.

That thereafter and upon the 12th day of February, 1884, while this plaintiff was so upon the cars of this defendant, such passenger as aforesaid, and while this defendant, through its agents, officers, and servants, engaged in running and operating said passenger train, were attempting and undertaking to carry this plaintiff from said Cedar Rapids to the point in Minnesota aforesaid upon its sail railway, by reason of the grossly negligent and wantonly careless acts and conduct of the said defendant, its servants, agents, and employés, who then and there carelessly, recklessly, wantonly, and unnecessarily ran and operated said train at an excessive and dangerous rate of speed, and by reason of the imperfect and unsafe condition of the road-bed, cars, coaches, locomotives, and machinery of said defendant, *used* and operating said railway, and by reason of the incompetency, unskillfulness, and recklessness of its said employés so operating said train of cars, the said train of cars in the night-time of said 12th day of February, 1884, was
4 thrown from the track and set on fire; that by reason thereof this plaintiff was burned by coal from the stove in said car [and] otherwise greatly and permanently injured; that the muscles, tissues, and skin upon the plaintiff's stomach were burned off in many places, exposing the bowels; that both of his arms were burned from the elbows to the fingers' ends, and the thumbs and fingers of this plaintiff permanently crippled; that he was burned in the face, neck, and head, and that his ears were both burned away and are wholly disfigured; that both his eyes were entirely destroyed; that his right leg both above and below the knee was badly burned and permanently crippled; that his left leg was seriously burned above and under the knee, and that he was seriously burned on both hips and the right shoulder.

That by reason of said injuries this plaintiff is forever blind and crippled; that he has suffered and still suffers all the pains consequent upon injuries of the character aforesaid, and that by reason of the same he is and forever will be absolutely precluded from in anywise obtaining his livelihood, or in any manner contributing to his support.

That he is now of the age of eight years, and no more.

That by reason of the aforesaid injuries, and of the acts and negligence of the defendant in the premises as aforesaid, this plaintiff has been damaged, and has suffered damage, in the sum of fifty thousand dollars ($50,000), for which sum, together with the costs and disbursements of this action, he demands judgment
5 against said defendant.

Duly entitled, signed, and verified.

Answer.

STATE OF MINNESOTA, } ss.:
County of Ramsey, }

District Court, Second Judicial District.

CHARLES L. DUNN, a Minor, by Ellis Stone Gorman, His Guardian *ad litem*, Plaintiff,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Defendant.

Answering the complaint of the plaintiff in the cause above entitled, the defendant avers: That as to whether Ellis Stone Gorman was appointed or is now guardian *ad litem* of the minor Charles L. Dunn, named in said complaint, or whether he ever accepted such appointment, defendant has neither knowledge nor information sufficient to form a belief.

Defendant admits that at the time stated in said complaint the said Ellis Stone Gorman was, and still is, a citizen and resident of the city of St. Paul, in the State of Minnesota.

Defendant admits that at times stated in said complaint it was, and still is, a corporation duly created and existing under and by virtue of the laws of the State of Iowa, and lawfully transacting the business of a common carrier of passengers for hire at and from sundry places within the States of Iowa and Minnesota, and
6 engaged in operating as a railway company and as a common carrier of passengers and goods for hire a line of railway from Cedar Rapids, in the State of Iowa, to Albert Lea, in the State of Minnesota.

Defendant further admits that while the said Charles L. Dunn was upon one of its trains the car in which he was was thrown from the track at the time stated in said complaint, and he then received certain injuries, but as to the nature and extent thereof, or how produced, the defendant has neither knowledge nor information sufficient to form a belief.

That defendant denies each and every allegation in said complaint contained not hereinbefore admitted or denied upon information and belief.

Wherefore defendant demands judgment against the plaintiff for costs and disbursements.

Duly entitled, signed, and verified.

Petition to Remove to U. S. Circuit Court.

STATE OF MINNESOTA, }
County of Ramsey, } ss:

District Court, Second Judicial District.

CHARLES L. DUNN, a Minor, by Ellis Stone Gorman, His Guardian, *ad litem*, Plaintiff,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Defendant.

7 That the above-entitled cause is pending for trial and untried in the district court of Ramsey county, in the State of Minnesota, and that no term of court has been held or commenced since the commencement of this said action.

Second. That the defendant is now, and for more than five years last past has been, a corporation for railway purposes, duly organized under the laws of the State of Iowa, and during all that time was, and now is, engaged in operating by steam a rai road extending from the city of Burlington, in the State of Iowa, by way of the City of Cedar Rapids, also in the State of Iowa, to the city of Albert Lea, in the State of Minnesota, and in conveying over the same passengers, troops, Government supplies, mails, freight, and property, on their way from each of said States to the other; that the above action is brought to recover the sum of fifty thousand dollars damages for injuries alleged to have been suffered by Charles L. Dunn while, it is claimed, he was being carried by the defendant as a passenger from the city of Cedar Rapids, in the State of Iowa, to said city of Albert Lea, in the State of Minnesota, through the alleged negligence of the defendant; that at the time of the commencement of this action the plaintiff was, and still is, a citizen of the State of Minnesota; that at the time of the commencement of this action the defendant was, and still is, a citizen of the State of Iowa.

8 Third. That there is a controversy in said action between your petitioner, the above-named defendant, and the plaintiff in said action, and the amount in dispute in said action exceeds the sum or value of five hundred dollars, exclusive of costs.

Fourth. Your petitioner makes and files herewith an affidavit stating that it has reason to believe, and does believe, that from prejudice and local influence it will not be able to obtain justice in this court.

Fifth. Your petitioner makes and files herewith a bond of good and sufficient surety for its entering in the circuit court of the United States for the district of Minnesota on the first day of its next session a copy of the record in this action, and for paying all costs that may be awarded by said circuit court if said circuit court shall hold that the action has been wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to accept this petition and said bond, and order the transfer of said action to said circuit court of the United States for the district of Minnesota.

J. D. SPRINGER,
Attorney for Petitioner, Minneapolis, Minnesota.

STATE OF IOWA, }
County of Linn, } *ss:*

C. J. Ives, being first duly sworn, says that he is president of the within-named petitioner, The Burlington, Cedar Rapids &
9 Northern Railway Company, and has read the foregoing petition, and that the statements therein contained are true.

C. J. IVES.

Subscribed in my presence and sworn to before me by the said C. J. Ives this 9th day of September, A. D. 1884.

[SEAL.] JOHN C. BROCKSMIST,
Notary Public.

STATE OF MINNESOTA, }
County of Ramsey, } *ss:*

District Court, Second Judicial District.

CHARLES L. DUNN, a Minor, by Ellis Stone Gorman, His Guardian *ad litem*, Plaintiff,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Defendant.

STATE OF IOWA, }
County of Linn, } *ss:*

C. J. Ives, being duly sworn, says that he resides at the city of Cedar Rapids, in the State of Iowa, and is president of the above-named defendant; that said defendant has reason to believe, and does believe, that from prejudice and local influence the said defendant will not be able to obtain justice in said State court in the above-entitled cause.

C. J. IVES.

10 Subscribed in my presence and sworn to before me by the said C. J. Ives, this —th day of September, A. D. 1884.

[SEAL.] JOHN J. BROCKSMIST,
Notary Public.

Filed September 30th, 1884.

R. M. BELL, *Clerk.*

Bond.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

District Court, Second Judicial District.

CHARLES L. DUNN, a Minor, by Ellis Stone Gorman, His Guardian *ad litem*, Plaintiff,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Defendant.

Know all men by these presents that the Burlington, Cedar Rapids & Northern Railway Company, as principal, and Wm. H. Truesdale and C. D. Hammond, of the city of Minneapolis, in the State of Minnesota, as sureties, are held and firmly bound unto the plaintiff in the above-entitled action in the sum of five hundred dollars in lawful money of the United States of America, to be paid to the said plaintiff, his heirs and legal representatives; for which payment, well and truly to be made, we hereby bind ourselves, our heirs,
11 executors, administrators, successors, and assigns, both jointly and severally, by these presents.

Whereas an action was brought by the above-named plaintiff in the above-named court, on or about the — day of August, A. D. 1884, against the above-named defendant, which is now pending for trial and untried in the above-named court, and is removable into the circuit court of the United States for the district of Minnesota, under the provision of section 639 of the Revised Statutes of the United States; and

Whereas the above-named defendant, by its president, has made and filed in the said court the affidavit required by the provisions of said section 639 of the Revised Statutes of the United States, and has filed its petition in said court for the removal of said action into the next circuit court of the United States to be held in the District of Minnesota:

Now, therefore, the condition of the above obligation is such that if the above-bounden The Burlington, Cedar Rapids & Northern Railway Company, its successors or assigns, shall enter or caused to be entered in the circuit court of the United States for the district of Minnesota, on the first day of its stated session next ensuing after the order of the said district court of Ramsey county for the removal of said action in said circuit court, copies of all process, pleadings, depositions, testimony, and other proceedings in said action, and do, or cause to be done, such other appropriate acts as by said provisions of section 639 of the Revised Statutes of the United States are required to be done upon the removal of an action into
12 the United States circuit court, then the above obligation to be void; otherwise in full force and effect.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY,
By J. D. SPRINGER, *Its Attorney.*

Signed in presence of—

——— ———.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

On this 30th day of September, A. D. 1884, before me personally appeared J. D. Springer, to me personally known, and who, being by me duly sworn, doth say—

That he is attorney for the above-named defendant, The Burlington, Cedar Rapids & Northern Railway Company, in the above-entitled cause; that said instrument was signed by him in behalf of said corporation, and he acknowledged the execution of the same to be the free act and deed of said corporation; and at the same time and place also appeared before me Wm. H. Truesdale and C. D. Hammond, each to me personally known to be the same persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed severally.

[SEAL.] A. M. ALLEN,
Notary Public, Minn.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

13 Wm. H. Truesdale and C. D. Hammond, being by me both duly sworn, doth each for himself on his oath depose and say that he is a resident of the city of Minneapolis, in the county and State aforesaid, and a freeholder in said State; that he is worth in unencumbered property in the State of Minnesota, subject to execution, the sum of one thousand dollars and upwards.

W. H. TRUESDALE.
C. D. HAMMOND.

Subscribed in my presence and sworn to before me by the said W. H. Truesdale and C. D. Hammond this 30th day of September, A. D. 1884.

[SEAL.] A. M. ALLEN,
Notary Public, Minn.

Filed Sept. 30th, 1884.

R. M. BELL, *Clerk.*

Counter-Affidavit

STATE OF MINNESOTA, } ss:
County of Ramsey, }

District Court, 2d District.

CHARLES L. DUNN, by E. S. Gorman, His Guardian *ad litem*, Plaintiff,
against
THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY, Defendant.

STATE OF MINNESOTA, } ss:
County of Ramsey. }

14 C. D. O'Brien, being duly sworn, deposes and says that at the time that the cause of action occurred to the plaintiff

herein said plaintiff was a citizen of and domiciled in the Territory of Montana, and that ever since that time said plaintiff has been and now is a citizen and resident of said Territory and domiciled therein; all of which are well known to said defendant.

C. D. O'BRIEN.

Subscribed and sworn to before me this 4th day of October, A. D. 1884.

[SEAL.] E. S. GORMAN,
Notary Public, Ramsey County, Minn.

Order Overruling Petition.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

District Court, Second Judicial District.

CHARLES L. DUNN, a Minor, by Ellis Stone Gorman, His Guardian *ad litem*, Plaintiff,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Defendant.

After such examination as I have been able to give the matter in the midst of a term, I am convinced, contrary to my first impression, that where the removal of a case is sought from a State court it has the right and must of necessity determine for itself whether the case is one where the right of removal exists.

15 The language of the statute of the United States providing for the removal does not warrant the assumption that upon the filing of a petition for removal the State court is to transfer the case or cease to act in the case without regard to the nature of the case or what the facts are. The statute provides that where the citizenship of the parties is as specified and a petition is filed with security, etc., the State court shall proceed no further. The facts must exist and the petition must be filed. In the removal causes, so called, which went to the Supreme Court from Iowa, it was held that the facts warranted a removal, not that the removal should have taken place irrespective of the facts.

In Railway Co. *vs.* Ramsey, 22 Wallace, U. S., 328, Ch. J. Waite uses this language: "To obtain the transfer of a suit the party desiring it must file in the State court a petition therefor, and tender the required surety. Such a petition must state facts to entitle him to have the transfer made. This cannot be done without showing that the circuit court would have jurisdiction of the suit when transferred.

"If upon the hearing of the petition it is sustained by the proof, the State court can proceed no further in this case."

And I find no case in the U. S. courts where any other rule is announced. Without discussing the question at length, my conclusion is not to accept the security offered and transfer this cause

until proof is made of the citizenship of plaintiff, that allegation of the petition having been put in issue.

16

H. R. BRILL, *Judge*.

Endorsed: Filed October 31, 1884. R. M. Bell, clerk.

Settled Case.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

District Court, Second Judicial District.

CHARLES L. DUNN, a Minor, by Ellis Stone Gorman, His Guardian *ad litem*, Plaintiff,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Defendant.

This cause was called for trial by Hon. H. R. Brill, judge of the district court for Ramsey county, on the 12th day of December, A. D. 1884, at the general September term of said court, with a jury. C. D. O'Brien, Esq., appeared as an attorney on behalf of the plaintiff, and J. D. Springer, Esq., appeared as attorney on behalf of the defendant, with C. K. Davis of counsel for the defendant.

Upon the case being called by the court, Mr. Springer said:

17

May it please the court: I appear specially at this time for the purpose of calling your honor's attention to a transcript in this case from the Federal court showing the removal of the cause to that court, and to object to this court assuming jurisdiction or proceeding with the trial of the case, which transcript is hereto attached, marked "A," and made a part hereof.

(Here follows copy of complaint, answer, petition for removal, affidavit of prejudice, bond for removal, affidavit of C. D. O'Brien in opposition, and opinion and order of the court thereon as set forth above, and also the following certificates:)

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Second Judicial District.

I, R. M. Bell, clerk of district court, Ramsey county and State of Minnesota, do hereby certify that I have compared the foregoing paper writing with the original record in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said court at St. Paul this 8th day of December, A. D. 1884.

[SEAL.] R. M. BELL, *Clerk*.

Endorsed: Filed December 8th, 1884. Oscar B. Hillis, clerk.

18 UNITED STATES OF AMERICA, *sct:*

I, Oscar B. Hillis, clerk of the circuit court of the United States for the district of Minnesota, do hereby certify that the foregoing is a true copy of the return from the district court of Ramsey county in the cause therein named as fully as the same appears of record in my office.

Witness my hand as clerk and the seal of said court.

Done at office in Saint Paul, Minnesota, this 11th day of December, A. D. 1884.

[SEAL.] OSCAR B. HILLIS, *Clerk.*

THE COURT: This is the same case where the question was raised some time ago.

Mr. O'BRIEN: Yes, sir; and in addition to that fact, immediately on the order of this court, I notified the learned counsel for the defendant that my witnesses resided 1,400 miles distant from this court, and that I wanted to know whether he intended to take any proceedings. From that day until this moment there has not been the slightest advice or intimation to me that any proceedings would be taken touching the removal, or any proceeding of any kind.

Mr. SPRINGER: I don't know of any rule of law or rule of court that requires me to announce my intentions to the counsel on the other side.

19 THE COURT: I do not suppose that would affect the case; I think we will proceed, however.

Mr. SPRINGER: Note an exception. Gov. Davis appears with me in the case.

A jury was then called and sworn, and Mr. O'Brien opened the case on behalf of the plaintiff, whereupon the following evidence was introduced and proceedings had:

Plaintiff introduces in evidence without objection the application, the order, and the appointment of the guardian *ad litem*, constituting a part of the files in the case.

ELIJAH CUNNINGHAM, sworn and examined on behalf of the plaintiff, testified:

Direct examination:

Q. Mr. Cunningham, where do you reside?
A. Glendive, Dawson county, Montana.
Q. How long have you lived there?
A. It will be three years the first of next March.
Q. Where did you live before that time?
A. Northern Wisconsin: Baron county.
Q. What is your business?
A. I am in the coal business at the present, furnishing the town with coal at Glendive.
Q. Do you know this boy, Charley Dunn?
A. Yes, sir.
20 Q. The plaintiff here?

A. Yes, sir.
Q. Do you know his mother and father?
A. I do.
Q. State whether or not you were on the train.
A. I was.
Q. At the time the accident which injured this boy occurred?
A. Yes, sir.
Q. On the 12th of February last?
A. Yes, sir.
Q. That was the train of this defendant, the Burlington, Cedar Rapids & Northern Railroad Company?
A. Yes, sir.
Q. Where did you take that train that night?
A. At Shell Rock, Iowa.
Q. Was that a passenger train?
A. Yes, sir.
Q. Do you remember what it was comprised of—how many cars?
A. Well, I couldn't say as to the number of cars positively.
Q. It was a passenger train?
A. Yes, sir.
Q. Bound north?
A. Yes, sir.
Q. How far is this point, Shell Rock, from the point where the accident took place?
A. I think it was about 13½ miles; it is counted 16 miles to Greene.
21 Q. Had you ever been over that road before?
A. Yes, sir; a great many times.
Q. You knew the section and were accustomed to the road?
A. Yes, sir.
Q. Now what time was it that you took that train; of the day or the night?
A. In the night.
Q. In the nighttime?
A. Yes, sir.
Q. At what hour?
A. Well, it was somewhere near 11 o'clock—between 11 and 12.
Q. Will you state whether or not that train was on time at that station?
A. I learned by the agent there that it was behind time.

Mr. SPRINGER: We object to that as incompetent.

Mr. O'BRIEN: I think it is competent; the station agent's statement to him.

Mr. SPRINGER: I object to it as incompetent.

The COURT: I doubt somewhat if it is.

Q. Was it in that station that you got this information?
A. Yes, sir.

Mr. SPRINGER: That is objected to.

Q. And from whom, without saying what information you got?

22 Mr. SPRINGER: Well, we object to that as incompetent.

Mr. O'BRIEN: I offer to show by the witness that upon applying for his ticket at the station that night the station agent at that station told him the train was late.

Objected to as incompetent. Objection sustained. Exception by plaintiff.

Q. Well, you took the train?

A. Yes, sir.

Q. Now, go on and state what the speed of that train was after it started up, up to the time of the accident.

A. I should judge about 45 miles an hour.

Q. Go on and describe the effect upon the cars.

A. Well, sir, to begin with, right away after I got onto the cars I had just taken off my overcoat and arctics—just got seated comfortably, and I should not judge it was over 5 or 10 minutes—not over 10 minutes, I would not think, before the accident happened. It jumped the track, and the next thing we was all in a pile.

Q. Well, I want you to describe the train, the action, the motion of the train prior to the time it jumped the track.

A. Well, the train was just fairly waiving; it just fairly jerked me in my seat—she was under such speed.

Q. Because of the speed?

A. Yes, sir.

23 Q. You say you had frequently traveled over that road before?

A. I have.

Q. On that train?

A. I couldn't say as to that train.

Q. Well, I mean a train running on the same time?

A. Yes, sir.

Q. That express?

A. Oh, yes.

Q. How did that speed on this night compare with the other times that you traveled on it?

Objected to as incompetent, immaterial, and irrelevant.

Mr. O'BRIEN: I propose to show that it was an unusual rate of speed on that road.

The COURT: I think I will allow it.

Defendant excepts.

Q. How is that?

A. What was the question?

Q. How did that speed compare with the speed before when you traveled over the road?

Same objection, ruling, and exception.

A. Well, I should take it, a good deal faster.

Q. What do you say?

A. It was a great deal faster, I should judge.

Q. A great deal faster?

A. Yes, sir.

Q. Had you ever traveled as fast as that before on that road?

Objected to as leading, incompetent, immaterial, and
24 irrelevant.

Q. State whether or not you had ever traveled at that rate of speed on that road before.

Same objection. Objection overruled and exception by defendant.

Q. Go on.

Same objection, ruling, and exception.

A. I never have traveled as fast over that road before.

Q. Now, will you state what, if anything, took place? Did you have any conversation on the car before the accident, after you got on, with any of the employes of the road or employes of the train?

Objected to as incompetent and immaterial.

The COURT: I don't know whether it is material or not.

Mr. O'BRIEN: I propose to show by the witness that he addressed himself to the conductor or brakeman, I don't know which, remonstrating in relation to the rate of speed; that they told him that they had to make 45 miles an hour in order to make up for lost time.

Mr. SPRINGER: Objection renewed.

The COURT: I have some question about it, Mr. O'Brien.

Mr. O'BRIEN: It has been so held in this court in the case of O'Connor against the Milwaukee & St. Paul Railway Co., and affirmed by the Supreme Court, the declarations of the conductor, made after the accident took place, as to the position of the brakeman on the train at the time of the accident.

25 The COURT: Well, declarations made at the time of the accident, or so near it as to be held to be a part of the *res gestæ*.

Mr. O'BRIEN: This was within five minutes of the time of the accident; immediately before it. It seems to me there can be no question about it—the declaration of a man in charge of the train.

The objection was overruled, and defendant excepted to the ruling.

By Mr. SPRINGER:

Q. Was it the conductor or the brakeman that made that statement?

A. I couldn't say that; it was one of the train men.

Mr. SPRINGER: The objection is renewed.

The COURT: I overruled the objection upon the theory that it was the conductor.

Mr. O'BRIEN: I suppose it was the conductor; the witness says it was one of the train men. I suppose they are bound by the statement of any of their men. It was a short time before the accident.

It was answering the question of a passenger in relation to the rate of speed and in relation to the causes for running at that rate of speed.

The COURT: I doubt if it is competent if it was the brakeman.

Mr. O'BRIEN: Well, he don't know, and I don't know, and I can't tell. It was one of their employes. They propose to make it incompetent by the fact of its being a brakeman. This witness does not know it.

26 The COURT: Well, it is for you to show, I suppose, that it is competent. I understand the witness to say he don't know who it was.

Mr. O'BRIEN: He says it was one of the train employes.

The COURT: I will sustain the objection.

To this ruling the plaintiff duly excepted.

Mr. O'BRIEN: I offer to show by the witness that in a conversation between himself and one of the train employes, who was either a conductor or a brakeman, that he inquired the reason for such an extraordinary rate of speed, and was informed by the person addressed, who was either the conductor or the brakeman, that they had to run 45 miles an hour in order to make up for lost time.

Mr. SPRINGER: That is objected to upon the ground that it is incompetent and immaterial, and also upon the ground that the witness has already stated that he did not know whether it was the conductor or the brakeman and one of the train men—he didn't know which.

Objection sustained. Exception by plaintiff.

Q. Now, were there any stoves in that car?

A. Yes, sir.

Q. What was their condition—the condition of the front stove?

Objected to as incompetent, irrelevant, and not pleaded. Objection overruled. Exception by defendant.

27 A. The stove was of a cherry-red, they had just filled it up; it was very hot, and there was one of their brakemen came through and throwed open the door for it to cool off.

Q. He left the door open?

A. Yes, sir.

Q. With the fire inside?

A. Yes, sir.

Q. What kind of a stove was that?

Mr. SPRINGER: I suppose, in order to save time, we might let it be understood that all testimony in relation to the stove is under the objection and exception already stated.

The COURT: Yes, sir.

Q. Describe the stove.

A. I don't know as I could describe the stove altogether; I was sitting in the middle of the car; it was an ordinary stove, such as they have in cars, I should judge.

Q. Coal stove?

A. Oh, yes; coal stove.

Q. What kind of a door was it?

A. The door was a half round door.

Q. That you say was thrown open by the brakeman shortly before the accident.

A. Yes, sir.

Q. Was it open at the time of the accident?

A. Yes, sir; it was not throwed open but about a minute or two before it happened.

Q. Now go on and state what occurred, and about the acci-
28 dent. What was the first thing you knew?

A. Well, the next thing that I knew after we was throwed off and I got onto my feet I looked first at one end of the car and then at the other to see which end I was going to get out at. Well, I saw fire and smoke in both ends, and I started. I took my boy (my boy was with me) nine years old; I took him under my arm, and made my way to the door, and there was some gentleman there that held the door up—the car was laid on its side when it went off the track, clear across the wire fence, kind of quartering—and I went through to the rear end of the car, and they held up the door and I lifted him out; I got out myself and held up the door while there was another gentleman brought out the rest of them, what they could. Some of them was taken out through the door, and there was one or two lifted up through the windows overhead, let down.

Q. Was there any fire in the cars?

A. Yes, sir.

Q. Did the car take fire?

A. Yes, sir; it was very suffocating with smoke and burning cushions.

Q. Did you get it put out finally?

A. Yes, sir.

Q. Now, then, how far did that car go from the track after it left it?

A. Well, it went clear over the wire fence, quartering; and from where it first jumped I couldn't say exactly, not taking much interest then, you know.

29 Q. What do you mean; the wire fence on the right of way?

A. Yes, sir.

Q. It went clear over that, you say?

A. Yes, it lay kind of quartering of it; the car kind of quartering over the wire fence.

Q. How many cars went off?

A. Three coaches.

Q. Did any of them remain on the track?

A. Yes, sir; there was one remained on—that is, the fore wheels remained on; the hind wheels was let off—thrown down the bank.

Q. Which car was that?

A. That was the sleeper, I believe.

Q. How about the engine?

A. The engine staid on.

Q. How far was it from the point where the cars jumped the track to the point where the engine was when it got stopped?

A. Well, I couldn't say as to the exact distance; it was quite a long piece, though; I didn't measure that only with my eye.

Q. Did you see the wreck the next morning?

A. Yes, sir.

Q. Did you see the place where they went off?

A. Yes, sir, I did.

Q. What was the condition of the track there?

A. The track was spread; there was a broken rail; it was thrown from the effects of a broken rail, as I understand. I asked of the conductor himself—

Mr. SPRINGER: I move to strike that out.

30 Q. I don't care for that. You say the track was spread?

A. Yes, sir.

Q. Could you tell what kind of ballast there was on that track?

A. No, I couldn't say.

Q. Could you tell what kind of rail?

A. I think they were steel; I couldn't say, but I think they were.

Q. Do you know about the weight?

A. No, I couldn't say as to the weight.

Q. You don't know about the weight of the rail?

A. No, sir; but I am most certain they were steel.

Q. Did you see this broken rail?

A. Yes, sir.

Q. Did you observe the condition of it?

A. Well, not closely.

Q. What did you see of it?

A. I just saw that it was broken and that it was spread out, which caused the train to jump. I didn't examine it very closely.

Q. You didn't examine it very closely?

A. No, sir.

Q. Now, let me ask you if you saw Mrs. Dunn and her little boy before the accident?

A. Yes, sir.

Q. Saw the family?

A. Yes, sir.

Q. Where were they?

31 A. They were sitting in front of me, on towards the stove; right close by the stove.

Q. Well, now, after the accident did you see Charlie?

A. Yes, sir.

Q. Where was he when you first saw him?

A. When I first saw them they were bringing him out of the car; a gentleman lifted him out from the car.

Q. What was his condition?

A. Well, he was burned—black. His face was burned as black as a coal.

Q. Did you see him afterward?

A. Yes, sir.

Q. When?

A. I went right to the house, back in the field, with them that night. I went back there and staid there until they got other ways for us to get down to Greene.

Q. Did you notice how he was burned?

A. His face was burned black, and his bosom was burned here and his cheek here; his knees and his hands was burned just all to a crisp; horrible condition.

Q. Have you seen him since?

A. Yes, sir; a great many times.

Q. When?

A. I have saw him most every week.

Q. What has been his condition since in relation to these burns; are the evidences of those burns still on him?

32 A. Yes, sir.

Q. What has been the effect of those burns on him?

A. Well, they have caused him a great deal of sickness.

Q. Well, just state what his condition is.

A. Well, they are bad yet; they are sore.

Q. How is it about his eyes?

A. His eyes are both out; both the balls have run clear out.

Q. How is it about his ears?

A. His ears were burned.

Q. And his hands?

A. Yes, sir; one of his hands is crippled now for life; turned clear under.

Cross-examination by Mr. DAVIS:

Q. At what station did you get on?

A. Sir?

Q. What station was it that you got on to this train?

A. At Shell Rock, Iowa.

Q. How far from Shell Rock was it that this accident happened?

A. I should judge about 13½ miles.

Q. Had you passed any station before the accident happened?

A. Clarksville.

Q. Did you stop?

33 A. I don't think they made any stop there at all.

Q. Do you know whether you did or not?

A. Yes, I should be pretty apt to.

Q. I say do you know whether you made any stop there or not?

A. No, sir; I don't.

Q. How far is Clarksville from Shell Rock?

A. Seven miles, I believe.

Q. Then this accident happened about 6 miles and a half beyond Clarksville?

A. Somewhere in that neighborhood. It was about two and a half miles out of Greene. It is sixteen miles from Shell Rock to Greene, they call it, I believe; I have been there hundreds of times.

Q. At what time did you take passage at Shell Rock?

A. Well, sir, it was somewheres between eleven and twelve o'clock; I couldn't say just the hour—the time.

Q. Do you know what time it was that this accident happened?

A. Well, it was shortly after I got on; I couldn't say the time, for I didn't look at——

Q. I don't suppose you took out your watch.

A. No, sir; I don't think I did.

Q. Well, of course not—probably not. Now, about how long after you left Shell Rock was it before this accident happened, do you think?

34 A. Well, all the way I can judge is from the time it took me to get off my coat and sit down and get comfortably seated for the night. I had just got my big overcoat off and my arctics, and had *got* sat down there to take my rest, and I don't suppose it was over ten minutes before the accident happened. They just sailed right along.

Q. Where did you come from to come into Shell Rock; had you come in from the country, or had you been stopping there for some days?

A. My parents lived two and one-half miles from Shell Rock, across the line in Bremer county, and there's where I came from.

Q. What time was this?

A. This was in February, 1884.

Q. What time did you start from home that night to go to Shell Rock?

A. Well, sir, I started from home probably somewheres about 10 o'clock.

Q. Did you walk in or ride in?

A. I rode in.

Q. A clear night or a dark night?

A. Tolerably dark, and stormy.

Q. Snow blowing over the prairie?

A. Yes, sir; and it snowed hard too.

Q. Wind from the northwest?

A. Well, I couldn't say exactly as to that.

Q. How was the temperature?

A. Pretty cold.

Q. Below zero?

35 A. Yes, sir.

Q. How much below zero?

A. Well, I couldn't say as to that.

Q. Ten degrees?

A. I couldn't tell you; I didn't look.

Q. Did you come in in a sleigh?

A. Yes, sir; I came in in a sleigh.

Q. Did the sleigh creak and grind as it went along the road?

A. Well, I couldn't say as to that; I don't think it did, for it was snowing pretty hard, but it was what I call cold in that country—damp, you know.

Q. Will you tell us what you mean by the track being spread at that place?

A. Well, the way I looked at it, what caused it——

Q. Not the cause, but the condition of the track; you say it was spread. How did it look?

A. Well, the rail was kind of shoved out—widened out, you understand.

Q. Do you mean to say that the bottom of the rail was torn from the ties and spread out in that way?

A. Well, I think it was; I don't pretend to say positively as to that, but I know she was spread; I noticed the rail where it was broken—kind of spread out, you know.

Q. Wasn't the top of the rail broken down from the shank and the fragments spread out there?

A. I won't swear.

Q. And you won't attempt to swear it was torn from the bed of the rail?

36 A. No, sir; nothing but what I know to be a fact.

Redirect examination by Mr. O'Brien:

Q. How was the track at that point, straight or a curve?

A. There was a curve there.

Q. How sharp a curve—a perceptible curve?

A. I should judge, yes; it was not very short.

Q. On which side of the track did the car go off; on the inside or outside of the curve?

A. They went off on the inside, I believe.

Q. That track is north and south; which way from the curve, in on the west or out on the east side?

A. On the east side, I believe.

Q. Then the cars went off on the left-hand side of the track?

A. No, I don't think——

Q. As you came up north—this is north and south—did they go off on the right or left hand side? Did you go off to the right or left as you faced the engine?

A. Let me think; you see I am kind of turned around here now.

Q. Call it as you sit north and south; imagine yourself sitting in a car. Did you go off to your right or left?

A. Well, it seems like it went to the left, but I won't be positive.

Q. You are satisfied you went off on the inside of the curve?

37 A. Yes, sir; but I couldn't be positive as to the other.

Q. State whether or not you felt the cars surge up against the curve and back again.

A. Yes, sir; I felt that strongly.

Q. State whether, when you struck the curve, you felt the motion.

A. Yes, sir; I did.

Q. Well, what was it?

A. Well, it was quite a heavy jar.

Q. Now, when was it she went off, on the first jar or when it swung back?

A. Well, it was the second; we felt a heavy jar and then the next thing she jumped. I have been on a train when they would just jump on the ties; but I never had one bound as that one did.

Mr. SPRINGER: I move to strike that out as not responsive.

By Mr. O'BRIEN:

Q. What did you say?
WITNESS: I say I have been on a train——
Mr. SPRINGER: I object to his stating what he said.

(The reporter here read, at the request of the plaintiff's counsel, the statement of the witness moved to be stricken out as not responsive.)

Q. You stated you had been on trains when they jumped on the ties, but you were never on one that bounded as that train did?
A. No.

Mr. SPRINGER: I object to that question.

38 Q. Did you make that statement?

Mr. SPRINGER: I want your honor to pass upon the motion to strike out the statement of the witness. I want to object to the statement of the witness for the same reason.
The COURT: It may be stricken out.
Mr. SPRINGER: Now, this question is objected to as incompetent, irrelevant, and immaterial.

Objection sustained and exception by plaintiff.

Q. Have you traveled considerably on railroads?
A. Yes, sir.
Q. Familiar with trains and with their running?
A. Yes, sir.
Q. On different roads through the country?
A. Yes, sir.
Q. Passenger trains?
A. Yes, sir.
Q. Through Iowa and this State?
A. Yes, sir.
Q. As well as on this road itself?
A. Yes, sir.
Q. State when, in your experience, you ever traveled on a train that swayed and bounded as—you have stated that already.

Objected to as incompetent, immaterial, irrelevant, leading, and not based upon any matter drawn out on cross-examination, and not redirect examination.

Objection sustained. Exception by plaintiff.

Recross-examination by Mr. DAVIS:

Q. How long had you been living in Montana before this accident?

A. Well, sir; it is going on three years; it will be three years next March; the first of next March.

Q. Are you a neighbor up there of the plaintiff's father?

A. Yes, sir.

Q. At Glendive?

A. I live in Glendive, and he does, too.

Q. Had you lived at Glendive three years prior to last March?

A. Yes, sir; it will be 3 years next March since I came there—the first of next March.

Q. Had you been up there for 3 years or had you been back?

A. I had been there going on 3 years; went back on a visit.

Q. That your first visit back?

A. Yes, sir.

Q. Are you a relative to these parties?

A. No, sir.

Q. In no way?

A. No, sir; no way, shape, or form.

Q. This road ran north and south about there?

A. Yes, sir.

Q. Did that curve curve towards the east or towards the west?

A. Let me see; I think it turned towards the east; I think
40 it did.

Q. Now, did the car leave the track on the east of the track or the west?

A. It left on the east side, I think; that is my opinion.

C. E. PORTER, sworn and examined as a witness on behalf of the plaintiff, testified:

Direct examination by Mr. O'BRIEN:

Q. Where do you live?

A. Well, my place of residence just now is Reed's Landing, in this State.

Q. What is your business?

A. My business at the present time is master of laborers on the Government work in that vicinity.

Q. Do you know Mr. Dunn?

A. Well, I have met him to-day for the first time.

Q. You have heard the testimony of the last witness?

A. Yes, sir.

Q. Were you a passenger on this train when this accident occurred that hurt his son Charles?

A. Yes, sir.

Q. On the night of the 12th of February last?

A. Yes, sir.

Q. Where had you taken passage on that train?

A. At Waterloo, Iowa.

41 Q. You were coming to St. Paul or Minneapolis?

A. Yes, sir; St. Paul.
Q. Was this a passenger train?
A. Yes, sir.
Q. Do you remember the number of coaches?
A. I think they had three coaches and a sleeper.
Q. State whether or not that train was behind time from Waterloo?
A. I was informed that it was; yes, sir.

Mr. SPRINGER: Well, now, we object to that and move to strike it out as incompetent.
The COURT: He says he was informed; he don't say by whom.

Q. By whom?
A. By the agent at Waterloo.

Mr. SPRINGER: I move to strike out the testimony of this witness on the subject as to whether the train was behind time, on the ground that it was incompetent, being hearsay.
The COURT: I think it may be stricken out.

Exception by plaintiff.

Q. What time did you go to the station at Waterloo?
A. Well, as to that I couldn't say.
Q. The exact hour?
A. Yes, sir.
Q. State whether or not you applied to the agent there for information in relation to the whereabouts of the train?

Objected to as immaterial and incompetent.

42 Mr. O'BRIEN: I propose to follow it up by showing that the agent stated to him that the train was late.

Objected to as incompetent, irrelevant, and immaterial.

The COURT: I am inclined to think that you could show by the declarations of the agent what the time was for the train to leave there.
Mr. O'BRIEN: If his statement as to the time of the train leaving there is competent, certainly his statement that the train had not got there at a particular time ought to be equally competent. They are both facts, and one competent just as much as the other.
The COURT: I am not sure about that.
Mr. O'BRIEN: It is a part of his business to know; those trains are advertised to leave at regular hours; those agents are charged with the knowledge of it. The court takes judicial knowledge of the fact that those trains are run by telegraph; it is their business to know whether a train is late or not.
The COURT: I think it would be undoubtedly proper to show, upon an application to the station agent, as to the time that that train was due there, or departed from there, that he stated a certain time. The question in my mind was whether he could state it in the other form—that the train was late.

Mr. O'Brien: I propose to show the conversation between the witness and the agent about that; I don't know what the form of words was expressly.

The Court: I suppose it would be proper to show what
43 the time was that the train was due there or due to leave there. I think that would be the proper way of showing that that was the statement of the agent upon application. The question I had — was whether the other statement would not be a conclusion, perhaps, from the facts, as to whether it was late or not.

Q. Was there any conversation between you and the agent at Waterloo about the train?

Objected to as incompetent and immaterial.

The Court: I think you may ask that question.

The defendant excepted to the ruling.

A. Yes, sir.

Q. What was it?

Same objection, ruling, and exception.

A. I asked him if the train was on time; he informed me that it was not, that it was an hour late.

Mr. Springer: Now, I move to strike that out as incompetent, immaterial, and not responsive.

Q. Was there anything said——

Mr. Springer: Wait a moment. I desire a ruling on the objection.

Mr. O'Brien: I have a right to exhaust the witness on that point.

Mr. Springer: We have a right to have a ruling.

The Court: I will wait until Mr. O'Brien asks another question before I rule.

Mr. Springer: Exception.

By Mr. O'Brien:

Q. Now, Mr. Porter, what was the talk between you and the agent; was there anything said about when the train was due there—the hour?

44 A. No, sir.

Objected to as incompetent, immaterial, and leading.

Q. Give us the talk that occurred between you and the agent.

Same objection.

A. I went to the agent. I was very anxious——

Mr. Springer: We would like to have a ruling.

Mr. O'Brien: I understand that the court has just ruled I have a right to ask this question.

The Court: I think I will allow Mr. O'Brien to ask another question before I rule upon the question. You may note your exception if you are not satisfied with that.

A. I was very anxious to get to St. Paul, as I was engaged to go to work on the 13th of the month.

The COURT: You needn't mind about that.

Witness (continuing) and I went to ask him what time the train would be in. He informed me, but I have forgotten what time. I asked him if it was on time; he said it was not.

Q. He did give you the time that the train would be in?

A. Yes, sir; but I can't mention the hour. He informed me it was an hour late.

Mr. O'BRIEN: Now, I submit that the testimony is competent.

Mr. SPRINGER: Now, we move to strike out all the testimony of this witness in relation to the conversation with the agent of
45 the defendant at Waterloo as incompetent, immaterial, and irrelevant.

The COURT: I think I will strike it out.

Exception by plaintiff.

Q. What hour was it that you got onto the train?

A. I couldn't say.

Q. Generally?

A. It is my opinion that I got on about 10 o'clock.

Q. Do you know the distance from Waterloo to Greene?

A. No, sir; I do not.

Q. What coach did you get into?

A. I got into the last coach—that is, there was a sleeper behind the coach that I was in.

Q. That is the last coach except the sleeper?

A. Yes, sir.

Q. The sleeper was still behind you?

A. Yes, sir.

Q. You rode in that coach from that point to the time of the accident?

A. Yes, sir.

Q. Now state what was the speed of that train?

Objected to as immaterial.

The COURT: Well, at what time do you mean, Mr. O'Brien?

Mr. O'BRIEN: I propose to show by this witness the speed of that train from the time it left Waterloo up to the time of the accident.

Mr. SPRINGER. We interpose a further objection, that it is incompetent.

The COURT: I think you may show.

46 Exception by defendant.

A. About 45 or 50 miles an hour.

Q. That speed was kept up from the time you got onto the train until the accident occurred?

A. Yes, sir.

Objected to as incompetent and immaterial. Objection overruled and exception by defendant.

Q. State the effect upon the car; what was the effect or the motion of the cars during that time?

Same objection.

Q. Let this jury understand.

Same objection and exception.

A. It had a rocking, swinging motion to it—bouncing.
Q. Had you ridden on the road before?
A. Yes, sir.
Q. Frequently?
A. Twice before.
Q. On a passenger train running on this road?
A. Yes, sir.
Q. Same passenger?
A. Yes, sir.
Q. Have you ridden on other roads?
A. Yes, sir.
Q. Considerable experience in traveling on railroads?
A. Yes, sir.
Q. In this State and through Iowa?
A. Well, no sir; not through Iowa; I have in this State.
47 Q. State how that speed compared with the usual speed of passenger trains that you have ridden on?

Objected to as incompetent and immaterial.

The COURT: I think I will allow you to ask.

Exception by defendant.

A. It was somewhat faster than the ordinary rate of speed.
Q. How about the speed on that road at the other times when you had been there?

Same objection, ruling, and exception.

A. Well, it was considerably faster.
Q. You say it was faster?
A. Yes, sir.
Q. I want to know whether or not they ran by any stations prior to the accident taking place.

Objected to as immaterial and incompetent. Objection sustained. Exception by plaintiff.

Q. Now, Mr. Porter, go on and tell us about the accident.
A. Well, at the time of the accident or a few moments before I I was sitting back about four seats from the stove. I began to feel a little bit tired, so I took off my overshoes and coat and lay down. Just as I laid down the train jumped the track and commenced running across the ties, and finally the coach that I was in—that is, as far as I could see—jumped the track and turned over on its side, with the top towards the track, and slid down across the—down the embankment—the embankment about four and one-half or five feet high—down across the wire fence outside the right of way.

48 Q. How in regard to the stove?

A. I was lying down; I couldn't see, only I could see that the stove was hot. As far as this door being open I couldn't say, but when the car went over I looked around to see whether the coach was going to take fire or not. I saw it was not going to take fire, and so I went to helping those out that were inside. The consequence was that I was the last one out of the car. In the meantime I ran to the front end of the car and took two children—I didn't know who they were at the time—and took them out from under the cushions and stuff and fire that was there, and one of them was burned very severely.

Q. Was that this little boy, Charlie?

A. No; that was not the one; I picked him out from under the stove, but the other one I carried out of the coach myself.

Q. You took Charlie out from under the stove yourself?

A. Yes, sir.

Q. What was his condition?

A. His condition—he was burned very badly. His clothes were all in flames. I whipped the flames out and handed him to somebody, and they carried him to the back end of the coach. When they got to the back end of the coach the breeze fanned the flames up again and they put it out once more.

Q. Flamed up what?

A. The fire in his clothes.

Q. You carried him out?

49 A. No, sir; I didn't carry him out; I carried the other one out.

Q. The fire that you had partially put out blazed up again when it got to the air.

A. Yes, sir.

Q. Could you tell at the time how badly he was burned?

A. No, sir; I couldn't; I could see that his face was black and crisp, but then I couldn't tell whether it was soot or whether it was burnt.

Q. Was the stove broken away from its fastenings?

A. No, sir.

Q. The stove stood there?

A. Yes, sir.

Q. But the coals came out the inside?

A. The door came open or was open, and the coals came out and fell onto the child.

Q. That is the way he was burned?

A. Yes, sir.

Q. Now, did you notice the next day how far that car had gone after it left the track?

A. I didn't notice the next day; I noticed at the time; I didn't measure it accurately.

Q. Well, in your judgment, how far after it left the rails—how far did that car run?

A. It left the rails about 50 feet, I think.

Q. Well, I don't mean how far the car went sideways from the

track; I mean how far did the car run from the point where
50 the broken rail was, if there was one?

A. How far did the coach run from the broken rail?

Q. Yes.

A. About 300 feet.

Q. And how far to one side of the track did it go?

A. About 50 feet

Q. So it went 300 feet on the fill?

A. Yes, sir.

Q. Off the rails, and then went some 50 feet to one side?

A. Yes, sir.

Q. Turned over on its side—slid on the ground?

A. Yes, sir.

Q. How about the rest of the cars on the train?

A. They all went off except the hind coach; I don't mean the hind coach; I mean the sleeper. The hind end of the sleeper remained on the track.

Q. How was it about the distance they went—the other cars that went off?

A. They went some five or six hundred feet.

By Mr. DAVIS:

Q. How much?

A. Five or six hundred feet from the broken rail.

Q. And how far off to one side of the track did they go?

A. They went about the same distance as the one I was in.

Q. They went over the right of way, too?

A. Yes, sir.

51 Q. That was the baggage, the smoker, and your car?

A. Yes, sir.

Q. Was there a broken rail there?

A. Yes, sir.

Q. Now, was the road straight or was it a curve?

A. It was a curve.

Q. On which side of the curve did the cars go off?

A. Right on the inside of the curve.

Q. Went off on the inside of the curve?

A. Yes, sir.

Q. Which side was the rail broken on?

A. On the inside of the curve.

Q. Now, did you see that rail?

A. Yes, sir.

Q. Go on and describe the condition of the track and that rail.

A. The rail was split, and, as far as I could see, it was an old flaw in the rail and up about the center of the rail. Just above where it was split, some three or four feet, it was broken in two, and where it was broken I didn't notice whether it was an old break or not, but where the flaw was, where the rail was split, was an old flaw some 10 or 12 inches long.

Q. In the rail at that point?

A. Yes, sir.

Q. How about the rest of the track?

A. The rest of the track, with the exception of the rail
52 opposite from the one that was broken, was all right. The rail opposite from the one that was broken was spread some, as though the train had gone down between them.

Q. Do you mean bulged out outside?

A. Yes, sir; bulged out.

Q. So that on the opposite side it was sprung out?

A. Yes, sir.

Q. And the inside one was broken and split, you say, showing an old flaw?

A. Yes, sir.

Q. Was that flaw plain to see?

A. Yes, sir. I picked up a piece of the iron; the piece that was split was broken off.

Q. Was that towards the end of the rail—the joint?

A. Yes, sir.

Q. How far was that from the break where it was broken in two?

A. Three or four feet.

Q. Three or four feet from where it was broken in two?

A. Yes, sir.

Q. Could you tell which way it was, north or south, when the cars came on the rail? Did the cars strike where the flaw was first, or was it beyond where the flaw was, coming on to this particular rail?

A. It was broken where they came on to the rail.

Q. That is, where the flaw was?

53 A. Yes, sir.

Q. And that break occurred three or four feet up?

A. Yes, sir.

Q. Did you see Charlie afterwards?

A. I didn't see him after they put him into the sleigh until the train came down to Greene.

Q. I mean did you see him then?

A. I saw him at the hotel; yes, sir.

Q. What was the character of his injuries at that time?

A. Why, apparently, he was very severely burned.

Q. What parts were burned, apparently?

A. His head, face, ears, and eyes, and breast, and limbs, and hands.

Q. You saw him since, did you not, to-day.

A. Yes, sir; I saw him to-day for the first time.

Q. Did you observe the same parts burned?

A. Yes, sir.

Q. Did you notice how that road was ballasted?

A. No, sir; I did not; there was snow on it.

Q. You couldn't tell?

A. No, sir.

Cross-examination by Mr. DAVIS:

Q. You got on, you say, at Waterloo?

A. Yes, sir.

54 Q. About what time in the evening?

A. Well, sir, that I couldn't say; I think, though, it was about 10 o'clock—that is, I wouldn't swear that it was earlier or later than that.

Q. Now, what time did this casualty happen, as near as you can get at it?

A. About 1 o'clock.

Q. About 3 hours after you got on?

A. Well, I couldn't say as to how long after I got on.

Q. That is your judgment, isn't it?

A. Yes, sir.

Q. Had you been staying at Waterloo all that day, or came in?

A. I came in from Independence.

Q. By rail?

A. Yes, sir.

Q. Was that a warm or cold day?

A. Well, at that time it was pretty cold.

Q. How cold do you think it was, relative to zero?

A. Well, I couldn't say as to that; it was snowing, I know; it was very blustering and cold.

Q. Which way was the wind coming from?

A. I couldn't say.

Q. Now, which car were you in, relative to the engine; how many cars, first, were there on this train?

A. I think that there were three coaches—that is, including the smoker and the baggage car; three coaches and a baggage car and sleeper.

55 Q. Do you include the sleeper in the three coaches?

A. No; four with the sleeper. That is my idea of it.

Q. Now, which car were you in—next to the baggage car?

A. No, sir; I was in the last coach next to the sleeper.

Q. You were in the coach next to the sleeper?

A. Yes, sir.

Q. Had you ever been over this particular road before?

A. Yes, sir.

Q. How many times?

A. Twice.

Q. How long before?

A. About 4 months.

Q. Day-time or night-time?

A. Day-time. Well, I say about 4 months; I had been over just the day before.

Q. How far did the engine go from this break in the rail?

A. About 600 feet.

Q. You say the engine went 600 feet from the break in this rail?

A. About; yes, sir; I think.

Q. Was that the condition of things when you got out and looked around—the engine some 600 feet off?

A. Yes, sir.

56 Q. Was the engine detached from the baggage car?

A. Yes, sir.

Q. Fastenings broken?

A. I didn't notice that.

Q. Then how far did the baggage car come from this break in the rail before it jumped the embankment?

A. Well, I couldn't say before it jumped the embankment because I didn't notice.

Q. Well, how far did it go before it stopped?

A. Well, it went between five and six hundred feet.

Q. Now, how far did the next one go?

A. Well, I couldn't say as to that; I didn't notice just how far.

Q. Well, how far did that stop from the baggage car?

A. Well, I didn't notice; I couldn't say; some short distance apart.

Q. Well, how many feet?

A. I couldn't say, because I didn't notice.

Q. If you noticed one why didn't you notice the other?

A. I don't know how it happened that I didn't notice the other; I don't know how it happened that I noticed the one I did.

Q. Did the car next to the baggage car stop nearer to the baggage car than to your car?

57 A. Nearer to the baggage car than to my car.

Q. How far do you say your car ran off the track?

A. About 300 feet.

Q. And how far ahead of the car which ran off the track (the baggage car, I mean) was the engine, should you judge?

A. They were pretty close together—that is, the ends of them.

Q. Well, after you relieved the people from the wreck, you went back to look at this rail, did you not?

A. Yes, sir.

Q. You found an ordinary T-rail, didn't you?

A. Yes.

Q. Steel?

A. Well, I couldn't say whether it was steel or not.

Q. That you don't know?

A. No, sir.

Q. Now, was this flaw in the T of the rail or in the shank?

A. It was in what I would call the top part of the T.

Q. Here is the bed of the rail and here is the T; show me where the flaw was.

A. It was right on the inside.

Q. Take that pencil and, calling my hand on top the upper part of the rail and this side the shank, and this the bottom, tell me where the flaw was.

58 A. Right in the inside of the rail.

Q. Of the T of the cross-piece?

A. Yes, sir.

Q. Will you swear it wasn't all in the shank?

A. No, sir; I would not.

Q. Was there any flaw in the upper part of that rail, at all?

A. Yes, sir.

Q. Was there any flaw in the shank?

A. Well, I don't know what you call the shank.
Q. I call it this part upon which the cross-piece is supported.
A. No, sir; there was none in that.
Q. None, whatever?
A. Not that I could see.
Q. Positive of that?
A. Well, I am not positive of that; but then I noticed that the top part of the rail was split—a flaw in it.
Q. How long were you investigating that rail?
A. I was there perhaps 3 or 4 minutes.
Q. Some of the railroad men there at the same time?
A. No, sir.
Q. None of the train hands?
A. No, sir.
Q. Who was with you?
A. I don't know who the gentleman was; there was some gentleman standing there, and I went down to him; I don't know who he was.
59 Q. Had you ever met Mr. Dunn before?
A. No, sir.
Q. When you speak of one of the rails on this curve being spread, do you mean that it was torn from the bed and ties?
A. It was not torn up off of the tie; it was just spread out; the spikes had given away and it spread out.
Q. Well, how much of a spread?
A. Well, I couldn't say as to that.
Q. How much had the spikes given; had they drawn some?
A. They were drawn some, but I couldn't say whether they were drawn clear out or how much the rail was spread. I noticed it was spread some.
Q. Spread outwardly or inwardly?
A. Outward.
Q. And this train jumped the track on the east or west of the track?
A. On the east of the track.
Q. Which way was the curve, east or west?
A. East.

Mrs. DUNN, sworn and examined on behalf of the plaintiff, testified:

Direct-examination by Mr. O'BRIEN:

Q. Mrs. Dunn, you are the wife of Mr. Dunn?
A. Yes, sir.
60 Q. You are the mother of this boy, Charley, are you not?
A. Yes, sir.
Q. How old is Charley?
A. He was eight years old the second of August last.
Q. Your husband went to Montana, when?
A. I think it was the 14th of last July.
Q. You mean a year ago?

A. A year ago last July.
Q. And you were living at that time where?
A. Keyser, West Virginia.
Q. When, if at all, did you start to join your husband?
A. I started on the 6th of February.
Q. From Virginia?
A. From Virginia.
Q. Who was with you?
A. Well, my six children—myself and six children.
Q. At that time was Charley the youngest?
A. No, sir.
Q. You had one little baby?
A. There were three younger than Charley.
Q. You were traveling alone with your children, were you?
A. Alone with my children.
Q. Where did you get your tickets?
A. Keyser.
Q. Did you buy your tickets there?
A. I did, sir.
61 Q. Clear through to where?
A. To St. Paul.
Q. Where did you take the train—you had tickets over this road, the Burlington, Cedar Rapids & Northern, did you?
A. Yes, sir.
Q. Where did you take the train?
A. Chicago.
Q. At Chicago?
A. Yes, sir.
Q. Now, do you remember this accident?
A. I do, sir.
Q. Will you state what coach you were in with your children?
A. Well, that I couldn't tell you.
Q. Well, was it a sleeper or——
A. It was a coach.
Q. Do you know about what rate of speed that train was running; was it running fast or slow?
A. Well, it was running faster than any I had been in since I left home.
Q. At the time of the accident, I mean?
A. Yes, sir.
Q. How long just before the accident had it been running in that way?
A. Well, that I couldn't state.
Q. Well, I mean had it been running that way for some time?
A. Some time; but I could't tell the exact time.
62 Q. Can't you tell us how the cars acted—what the effect of running so fast was?
A. Well, it went very fast, and then of a sudden it gave a sudden jerk like, and then all turned over in a minute—slid over.
Q. Were you rendered unconcious?
A. No, sir.

Q. How far were you sitting—where was Charley sitting?

A. I was sitting—we were all sitting on the end of the car next to the stove. I was on the opposite side and Charley was next to the stove; just the seat next to the stove.

Q. Did you notice—was the car filled?

A. Yes; the car was tolerably well filled.

Q. Did you notice the condition of the stove—whether it was hot or not?

A. It was pretty hot; the brakeman had just opened the door a little while before, to cool it off.

Q. He had opened the door?

A. Yes, sir.

Q. Was the door open when the accident happened?

A. Well — that I didn't pass any remarks.

Q. Well, you say that he opened it a little before, and left it open?

A. He did; I suppose it was open, but I don't remember if it was open at the time.

63 Q. Well, now, what was the first thing you knew about the accident?

A. Well, I had the baby and another little one, 3½ years old then; I had both in my arms; one was asleep on one side of me and the baby I had in my arms, and another little boy lay on the other side of the seat, asleep. I had the three right in the seat with me, and two on the other side, and one in the seat behind. And when I got on my feet I had the baby and the one next to the baby—I had the baby by the cloak and the other little one by the head, as well as I can remember now—when I got to my feet, got standing up, after the accident.

Q. What was the first you saw of Charley?

A. Well, the oldest boy brought him over and said: "Ma, Charley!"

Q. Was that the first after you got outside?

A. Just inside, when we got to stand up.

Q. Where was you taken to then?

A. Taken to a farm-house—put into a sleigh and taken to a farm-house.

Q. Did you examine his injuries at that time?

A. Not until we went to the hotel; I seen that his hands was burned.

Q. I mean after you went to the hotel you examined his injuries?

A. The doctors came right away.

Q. You saw where he was burned, didn't you?

A. I saw where he was burned.

Mr. O'Brien: Your honor, I want the witness to point out the injuries occurring at that time to the child here. There is no
64 medical testimony in this case. I want her to take the child and point out the injuries.

Q. Will you go and get Charley and point out the injuries? Without exposing him, point out to the jury where he was burned.

The witness here left the stand and placed the child sitting in a chair before the jury.

WITNESS: Well, his whole face was literally burned; under his neck, all his mouth, as you can see; his lip—open your mouth, Charley—that is the way it generally hangs all the time; his breast had a large scar on it here; it is getting smaller; and this knee, from here to here (indicating), and both hands, from the elbow down, you can see it is drawn; this one the same; this joint here was dislocated and those bones all came out; and this finger here is a bone; and that hand was raw from here all around—clear all around; and altogether, after we dressed him, the first three weeks or four, he had 23 sores, and three weeks after he was burned his eyes came out; both eyes came out on his cheeks.

Q. That sore on his knee a running sore?

A. Yes, sir.

Q. His feet also burnt?

A. No, sir; he has one on his chest up here now (starting to unbutton his clothes in front).

Q. Is he able to walk?

A. No, sir; he has not stood more than to hold him in the arms for 10 months to-day.

Q. Now, how long was he laid up down there?

65 A. From the 12th of February to the last day of May.

Q. You then took him out where?

A. Out to Montana.

Q. That was the first time he was able to be moved?

A. That is the first time he was able to be moved.

Q. When, if at all, did your husband join you?

A. Three days after the accident, I think it was; two or three days. There was a storm, or some delay, that he didn't get there as soon as he expected.

Q. He remained with you up to what time?

A. Until the 1st of April.

Q. Did the child suffer?

A. He suffered terribly.

Q. Does he suffer still?

A. He suffers still. There is times that he don't. Well, he generally has to take medicine to keep the pain still.

Q. He requires constant attention, does he?

A. Yes, sir; he does.

Q. Entirely helpless?

A. Entirely helpless.

Q. Can't feed himself, or anything, can he?

A. Yes, sir; he feeds himself. Lately he has got to use his left hand.

Q. He is not able to walk or able to dress himself?

66 A. No, sir.

Q. You say some of those sores are still running?

A. There is six sores running.

Q. He is able to speak, I believe, is he not?

A. Oh, yes, sir; he talks right well.

Cross-examination by Mr. DAVIS:

Q. Madam, how far is it from Glendive here?
A. O, indeed I couldn't tell you how many nights.
Q. Well, how many days and nights were you coming down?
A. We left there Wednesday morning and got here Thursday at noon—from Montana here to Saint Paul.
Q. Is that correct—leaving Wednesday morning and getting here Thursday at noon? Think again.
A. I think we started Wednesday morning; yes, we were only one night on the train.

JAMES S. DUNN, sworn and examined on behalf of the plaintiff, testified.

Direct examination by Mr. O'BRIEN:

Q. Your name is James S. Dunn?
A. Yes, sir.
Q. Are you the father of this boy—Charley?
A. Yes, sir.
67 Q. And husband of Mrs. Dunn, the last witness?
A. Yes, sir.
Q. Where do you live?
A. Glendive, Montana.
Q. How long have you lived there?

Objected to as immaterial. Objection overruled and exception by defendant.

A. I have made that my home since May, 1883—no, since August. I left here in the latter part of July and went up there and went to running on that road—on the Northern Pacific road—the first week, I think, in August, and it has been my home since that time.
Q. And Glendive is the place in the Territory where you live?
A. Yes, sir.
Q. What is your business?
A. My business at the present time is baggage-master on the Northern Pacific road.
Q. How long have you been a railroad man?
A. 18 or 19 years.
Q. Continuously?
A. Yes, sir.
Q. In what capacity?
A. Different capacities; trackman, railroad conductor, brakeman, baggage-master.
Q. Continuously employed, for that time, in that business?
68 A. Yes, sir.
Q. How old are you?
A. 41 years the 26th of last August.
Q. When did you send for your family to join you in Montana?
A. The latter part of January.

Objected to as immaterial. Objection overruled and exception by defendant.

Q. When, did you say?

A. Latter part of January—January, 1883.

Q. 1884—last January?

A. Last January.

Q. Now, when you heard of this accident what did you do? Did you go down there?

A. Right away, on the train that was leaving the station at that time.

Q. The accident occurred on the night of the 12th of February. When did you get there, with reference to this accident?

A. I think it was on the afternoon of the 14th, as near as I can recollect at the present time.

Q. Where did you find Charley?

A. I found him at the DeGraw House, in Greene, in bed.

Q. Did you examine the scene of this accident?

A. Yes, sir.

Q. When?

A. Why, it was some time after, when I could get away from Charley; it was between six weeks and two months; we
69 didn't leave his bedside for 6 weeks; I never left his room for 6 weeks only to eat my meals.

Q. You didn't make any examination of the scene of this accident until then?

A. Not until that time, sir.

Q. Did you afterwards make an examination of the scene of this accident?

A. I did; yes, sir.

Q. State what character of track was there, as to being straight or crooked.

A. It is a curved track at that place; I should judge about five or six degrees of a curve—easy curve.

Q. Could you see the evidences of where the train had gone off the track?

A. No, sir; only in front—the place where the cars were ditched.

Q. I say could you see the marks where they were ditched?

A. Yes, yes.

Q. How far did those marks extend beyond the place where the railroad bed was?

A. From the crossing where the rail was said to be broke to where the first car lay was 600 feet, according to the way I stepped it off.

Q. Paced it off?

A. Yes, sir.

Q. How much farther ahead did you find the evidences of the wreck?

A. Not any further ahead than 600 feet; that was all. That
70 must have been the baggage car, for the glass was broken through and some splinters, etc., and the mark of the car where it went over the side. The mark was very plain in the dirt yet.

Q. How far was that from the side of the track?

A. It was not, I shouldn't think, over 30 feet, if it was 30; not over 30 feet; that is, from the nearest point where the mark was to the track.

A. I will ask you the general question with reference to those injuries your son is suffering from. Did you find those marks on him at the time of the accident?

A. I did; yes, sir; a great deal worse than that.

Q. Before that accident he had none of those on him?

A. No, sir.

Q. A strong, healthy child?

A. As healthy as ever was born.

Q. State how this road was ballasted.

Objected to as incompetent and immaterial—immaterial because of the length of time that elapsed between the time of the accident and the time when the witness made the examination.

The COURT: The question is what was the condition at the time of the accident.

Mr. O'BRIEN: Undoubtedly; but people don't change a better ballast to a poorer. If earth was objectionable it is not to be presumed that they took a good ballasting away and put in
71 earth. It can only be excluded on the presumption that this road was in worse condition when the witness saw it than it was at the time of the accident.

Q. The COURT: The question is, "What was the ballasting of the road?"

Mr. O'BRIEN: Yes, sir; what was the material of which the ballasting of the road was composed?

Q. The COURT: I think I will allow the question.

Exception by defendant.

Q. What was the ballast?

A. It was a dirt ballast; some people might call it a very fine gravel or sand; but it was more dirt than anything else; it was not what is known as gravel ballast or stone ballast.

Q. What was the size of the rail?

A. Well, I wouldn't be positive about it; but from my judgment of the matter it was either a 56 or 60 pound rail; that was the rail that was on the track at that time when I saw it.

Q. What are the weights of rails used in passenger roads?

A. Well, first-class roads are generally equipped with 65; I don't know of any road with less than 65; some roads run as high as 80 in the yard.

Q. The rails run from 60 or 65 to 80?

A. 65 to 80; that is what a first-class road is always equipped with. I don't know of any other first-class road in the country that would not be equipped with a rail of 65 to 80.

72 Q. What is a 56-pound rail?

A. 56 pounds is a very ordinary rail; I have known 56-pound rails in the service 20 years ago, in different roads east.

Q. Are they ordinarily used now in any well-equipped roads?
A. I don't think so.
Q. Do you know of any road in the State where they use a 56-pound rail?
A. I do not, indeed.
Q. Now, let me ask you whether or not the rate of speed of a train affects the question of its remaining on the rails?

Objected to as incompetent and immaterial. Objection overruled. Exception by defendant.

Q. How is that?
A. Sir?
Q. Does the rate of speed of a train affect the question of its remaining on the rail?
A. Why certainly; most undoubtedly.
Q. Go on and explain.

Same objection, ruling, and exception.

A. The faster a train runs on the road why the more danger there is; the more liability there is of its jumping the track and leaving the rail.
Q. Why?

Same objection, ruling, and exception.

73 A. In striking a curve—the train always strikes the curve coming off a straight line—the force with which it strikes the curve will spread the track, and, as a consequence of striking it, it very frequently occurs that there is a broken rail, and generally on the high side of the curve. I have seen broken rails on the low side of curves and on high sides both, where there will be a flaw in the curve, and from the swinging motion in coming around the curve it will work it out. I saw, for instance, on the Southern New Jersey railroad, where they use very light iron, I saw several rails, possibly fifty or sixty, in my time on that road that had been broken by that means.
Q. Now, then, taking this road as you saw it down there, taking the curve as you saw it, and the character of the rail which you saw, and the character of the ballast, what would you say as to the running of a train of cars over that road—a passenger train—at the rate of 45 or 50 miles an hour?
A. I wouldn't think it was safe.

Objected to as incompetent and immaterial.

Mr. O'Brien: Wait a moment.
The Court: Your question is, "What would you say?"
Mr. O'Brien: Of course, I don't ask him whether it was safe or unsafe.
The Court: Well, your question is very indefinite; I don't know what you mean by it.
Mr. O'Brien: Well, I will try and make it more definite.

74 Q. Taking into account the character of that road, as you saw it, the character of the ballasting, the character of the weight of the rail which you saw laid, the character and condition of the curve, what do you say as to the propriety or impropriety of running a passenger train over it at the rate of from 45 to 50 miles or 55 miles an hour?

Objected to as incompetent and immaterial.

The COURT: Well, it is material; the only question is whether it is competent—whether this witness is competent.

Mr. O'BRIEN: This witness says he has been engaged for 19 years in railroading.

The COURT: Well, Mr. O'Brien, he spoke of the rail as he found it after this accident occurred, some time. It appears that the rail was broken at the time, and I don't know that there is any presumption that the rails were the same. That question was not objected to regarding the rails; I did not rule upon that; this question embraces that also.

Mr. O'BRIEN: No person can urge a presumption of their default against the admission of testimony of this character. He finds a 56 or 60 pound rail, and he says that a 56-pound rail is almost obsolete; that the very lightest used for the purpose of safety is a 60-pound rail. Now, it cannot be presumed that they would put on a lighter rail than the one they broke. I suppose the court is aware that rails are uniform in weight; they do not put down a 56-pound rail, and then a 60-pound rail, and then a 65-pound rail next to that. I will ask the witness those questions.

75 Q. State whether or not the character of rails laid in a railroad is uniform—whether it is necessarily uniform—with reference to the weight.

Objected to as incompetent and immaterial.

Q. I mean if a road is laid with 56-pound rail, the next rail a 60-pound rail, and so on.

Objected to as incompetent and immaterial. Objection sustained.

Mr O'BRIEN: I offer to show by the witness, basing it upon the fact that no objection is made to his competency, that the running of a train at the speed of 45 to 55 miles an hour over that road, upon that track, in the condition that he saw it six weeks after the accident, and the rail of that weight, and curve of that character, was unsafe, hazardous, dangerous, and in his judgment wantonly negligent.

Objected to on the ground that it is incompetent, and because there is no foundation laid. Objection sustained. Exception by plaintiff.

Q. You didn't see this broken rail, did you?

A. I saw what I was told was the broken rail.

Mr. DAVIS: Never mind.

Q. Whether it was the broken rail or not you don't know?

A. Mr. Brady told me it was the broken rail.

Q. Who was Mr. Brady?

Mr. DAVIS: Stop; I object.

A. Mr. Brady, I presume (I don't know really what his title was) was general agent; he has a position that I never saw one like
76 it before on a railroad; superintendent, I believe, general agent.

Q. You say he pointed out this rail to you?

A. No, sir; he told me to go and see his agent at Greene and he would show me the rail, and I went and his agent showed me a rail, in the freight-house, which he said was the rail that came out of the place that was broke.

Mr. O'BRIEN: Now I offer to have the witness describe that rail.

Objected to as incompetent and immaterial.

The COURT: I don't think you can show it under the circumstances he has detailed.

Exception by plaintiff.

Q. Mr. Dunn, is 50 to 55 miles an hour a safe speed to run a railroad passenger train?

Objected to as incompetent and immaterial and no proper foundation laid.

The COURT: I think he may answer the question.

Exception by defendant.

A. On a proper track; yes, sir.

Q. On a proper track?

A. Yes, sir.

Q. What would you call a proper track?

Objected to as incompetent, immaterial, and no proper foundation laid. Objection overruled. Defendant excepts.

Q. What would you call a proper track?

Same objection, ruling, and exception.

77 A. With a proper track, with oak ties, and properly ballasted, and good, heavy steel rail, not lighter than 70 pounds to the yard, I consider 50 or even 60 miles an hour perfectly safe to run on such a track.

Q. Would it be safe to run a train at that rate of speed, or 45 miles an hour, upon a track with earthen ballast, with a fifty-six to sixty-pound rail and without oak ties?

Objected to as incompetent, immaterial, and no proper foundation laid. Objection sustained.

Q. What kind of ties did you see on this road when you were there?

Objected to as immaterial, incompetent, and irrelevant. Objection sustained. Exception by plaintiff.

Mr. O'BRIEN: I propose to prove by this witness that the running of a train at the rate of 40 or 45 miles an hour, or any rate of speed

in excess of that, over this railroad, or over any railroad laid with a weight of iron of the weight that this railroad used, as testified to, with an earthen ballasting and with ties of the character laid in this road, was negligent and dangerous *per se*. I also offer to show by the witness, from his observation and examination of that road, that the ties, ballasting, and rail on the portion of the road that he examined had, with the exception of one piece of rail 30 feet long, been laid for more than two months prior to his examination.

78 Objected to as incompetent, immaterial, and because no proper foundation has been laid.

The COURT: I think if he can testify to that fact, it — competent for him.

Mr. O'BRIEN: Do you mean as to the time the ties were laid?

The COURT: Yes, sir.

Q. Mr. Dunn, state how long those ties had been down.

Same objection. Objection overruled. Exception by defendant.

A. Well, I couldn't say, but they had been laid, they must have been laid, right after the frost came out of the ground; that was a very short time before I went down there.

Mr. DAVIS: What is that?

A. I say they couldn't have been taken out before the frost came out of the ground.

Q. You observed those ties; do you know how long those ties had been down?

A. That I couldn't say.

Q. I want to know whether or not they had been laid down before; whether you could tell from their appearance whether they were the same ties that were there at the time of the accident, or not?

A. No; there was some new ties there.

Q. I want to know if you examined any parts of the road close by this accident, where the ties were laid down that had been laid down before the accident?

79 Objected to as incompetent, immaterial, and, irrelevant.

The COURT: At the place of the accident, confining it to that, I will allow you to ask.

Mr. O'BRIEN: I confine it to the accident; there may have been one tie changed or three ties changed; I want to show the general character of the road there.

To the witness:

Q. I don't mean when the ties had been changed; I want to know whether or not you could tell whether ties had been changed in that vicinity?

A. There was some ties apparently——

Mr. SPRINGER: Wait a moment until the question has been asked.

Mr. O'BRIEN: The question is asked.

Objected to as incompetent, immaterial, and irrelevant.

The COURT: The question is whether he can tell.

Defendant excepts.

Q. Go on, Mr. Dunn.

A. Were the ties here laid down that had been laid down before the accident?

Q. What I want to get at is this: Whether or not you could tell, by examining that track, what ties had been laid down before the accident, and what the new ties were?

Objected to as incompetent, immaterial, and irrelevant.

80 Mr. O'BRIEN: Consider every question that I ask is objected to as incompetent, immaterial, and irrelevant. Put that down on the record and then the stenographer can add the others.

The COURT: That objection is overruled and exception entered for the defendant.

Mr. SPRINGER: That is all right.

WITNESS: The track had been repaired after the accident occurred; there was some new ties in the track and some of the old ties, and, of course, old ties will show where the rail has been eaten down. Some ties are very soft, and consequently it is a hard matter to tell how long that tie has been in by the marks on the rail. Of course, a good strong oak tie will last a whole year and won't show as much marks as a pine tie will from a month's use.

Q. What I want to know is if, from the examination you made, you could tell whether or not some of the ties had been down more than six weeks?

A. Why, of course.

Same objection, ruling, and exception.

Q. Now, about the ballasting: Could you, from your examination of the ballasting, tell whether or not it had been down more than 6 weeks?

A. No; I couldn't tell anything about the ballasting at all.

Same objection, ruling, and exception.

Q. Couldn't you tell whether it was new or old?

A. No, sir.

81 [Q.] Couldn't you tell from the rails and spikes how long they had been laid down?

Same objection: incompetent, irrelevant, and immaterial. Objection overruled. Exception by defendant.

A. The spikes; of course that rail was spiked down there.

The Court: Answer the question.

Q. I am speaking of the spikes where you examined it; could you tell from the spikes and rails about how long they had been laid down?

Same objection, ruling, and exception.

A. No, sir; no, sir; it would be impossible for me to tell that, because the rust on top of a spike will take the hammer mark off. A shower of rain——

Q. With the exception of this one rail, could you tell whether or not that track had been laid down with those same ties and with that same ballasting for at least six weeks?

A. Oh, yes.

Same objection, ruling, and exception.

Q. I want to know whether or not, with the exception of that rail—what I want to get at is this: That saving and excepting that one rail that was broken out, and the one or two or three ties that may have been put in for that place, whether or not you can say, from your experience as a railroad man, that the balance of that track at that point, where the ties and ballasting were, was the same that had been there before the accident, or whether they had been changed afterwards.

82 Objected to as incompetent, immaterial, and irrelevant. Objection overruled. Exception by defendant.

A. As far as my judgment would lead me to believe in the matter, there was the self-same track that had been there all the winter. I walked the track from Greene up, and it was the same track all the way.

Q. Now, then, the same track that had been laid there before the accident?

Same objection, ruling, and exception.

A. Yes, sir.

And further objected to on the ground that it is a repetition of the same question.

The Court: It is a repetition of the same question.

Q. Now, then, state whether or not, in your judgment, it would be safe or unsafe to run a train of passenger cars at the rate of 40, 45, 50, or 55 miles an hour over that track?

Objected to as incompetent, immaterial, irrelevant, and because the proper foundation has not been laid.

The Court: I think I will allow the question.

Exception by defendant.

Q. What do you say?

A. It would not be safe.

Q. It would not be safe?

A. No, sir; not on that track.

83 Q. What would be the probable effect of running a train at that speed—the speed I have described—on that track?

Same objection as to last question and same ruling and exception.

A. The effect would be to spread the rails by the constant swinging of the engine and cars, and swinging around a curve would spread the rails, and when you take a certain tie the rails would spread, so that just as soon as she came in on a curve she would drop down off the rails.

Q. What would be the effect on the train?

Same objection, ruling, and exception.

A. A swinging motion?

Q. No, no. What would happen to the train?

A. The train would be ditched.

Q. The effect would be the ditching of the train?

Same objection, ruling, and exception.

A. Yes, sir.

Q. Now, let me ask you another question: What is the effect on a train that is fitted with air-brakes? What is the effect of detaching one car from another?

Objected to as immaterial and incompetent.

The COURT: It does not appear that there was air-brakes on this train.

Mr. O'BRIEN: I propose to follow it up by proof of the air-brakes on the train.

The COURT: What is the purpose of the question?

84 Mr. O'BRIEN: I propose to show this as characterizing the speed of the train. This train was equipped with air-brakes. Now the effect: I propose to show by the witness that the moment you detach those air-brakes it sets the brakes on all the cars. I propose to show that when this baggage car jumped the track it necessarily detached the air-brakes, and it must have set the brake on every car on the train; and I propose to argue to the jury on the question of the velocity of that train, the fact of that train going 600 feet with every brake set on it. That is competent for the purpose of arriving at the rate of speed.

The COURT: I understand you to say you will follow it up by showing that there were air-brakes?

Mr. O'BRIEN: Yes, sir; or, if the counsel desire it, I will precede it.

To Mr. SPRINGER: Do you deny that there were air-brakes on the train?

Mr. SPRINGER: I am not on the stand just now.

Mr. O'BRIEN: Mr. Forrest, come forward and be examined. I will withdraw this witness for a moment.

Mr. SPRINGER: I object to that.

The COURT: I will allow him to withdraw the witness for the purpose of showing that fact.

J. P. FORREST, sworn and examined on behalf of the plaintiff, testified:

85 Direct examination by Mr. O'BRIEN:

Q. Mr. Forrest, were you the conductor of this train that this accident occurred on?

A. Yes, sir.

Q. Were there air-brakes on that train that night?

A. Yes, sir.

JAMES S. DUNN, [being] recalled on behalf of the plaintiff, his direct examination was continued as follows:

By Mr. O'BRIEN:

Q. With a train equipped with air-brakes, what is the effect of detaching a car or engine from the train?

Objected to as incompetent, immaterial, and irrelevant.

Q. The effect on the brakes?

Same objection as to the last question. Objection overruled. Defendant excepts.

A. With an automatic air-brake, when a train breaks in two, the brake is applied to every car in the train, and the engine also—that is, to the tank, the tender of the engine—every place where it is used; it applies itself at once—instantly—as soon as it breaks in two.

86 Q. When the cars of a train leave the track and the engine remains on does that necessarily disconnect the air-brakes?

Objected to for the same reasons as before. Objection overruled. Exception by defendant.

A. Most undoubtedly it does, sir.

Cross-examination by Mr. DAVIS:

Q. You came down from home and reached the place where your little boy was lying on about the 14th day of February last?

A. I think it was about the 14th, sir; I would not be real positive.

Q. And you staid there for about six weeks, giving him your undivided attention?

A. Yes, sir.

Q. And then went to look at what you supposed was the scene of this casualty?

A. After he got so that he was out of danger.

Q. That was about 6 weeks, wasn't it?

A. About that; possibly it might be a little more.

Q. About the 1st of April?

A. I wouldn't say exactly when, but he lay for 6 weeks that he wasn't safe.

Q. Well, never mind that; answer my question. Was there snow on the ground when you went to examine that?

A. No, sir.

87 Q. All cleared off?
A. Yes, sir.
Q. Was it muddy and soft?
A. No, sir; it was dry, apparently.
Q. Was the frost all out of the ground?
A. All that I saw it was; yes. There might have been some frost away down; I don't know.

Plaintiff rests.

Counsel for defendant offers in evidence depositions of Samuel Fentrell and A. W. Fiero.

Objected to by plaintiff's counsel on the following grounds: That the notice for the taking of said depositions was served upon plaintiff's counsel on the 25th day of November, 1884, notifying said counsel that said depositions would be taken on the 5th day of December, during term time, at which term the cause was pending for trial; on the ground that the notice is insufficient because it does not state the place of residence of the deponents nor the fact that they reside outside the State or more than 100 miles from the place of trial; on the ground that no reason is given for the taking of the depositions.

Pending argument on the objections, court adjourned until 9:30 a. m., December 13, 1884.

Court having convened pursuant to adjournment, the objections were overruled and the plaintiff duly excepted.

88 Counsel for the defendant then read in evidence the depositions of Samuel Fentrell and A. W. Fiero, which are as follows:

STATE OF MINNESOTA, } ss:
County of Ramsey, }

District Court, Second Judicial District.

CHARLES L. DUNN, a Minor, by Ellis Stone Gorman, His Guardian *ad litem*, Plaintiff,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Defendants.

To the above-named plaintiff and to Messrs. O'Brien & Wilson, his attorneys:

You are hereby notified that on the 5th day of December, A. D. 1884, commencing at the hour of 9 o'clock a. m., before J. F. Wilson, a notary public in and for the county of Will, in the State of Illinois, at his office in the city of Joliet, in said county, the above-named defendant will take the depositions of H. S. Smith, Samuel Fentrell, and A. W. Fiero, to be read in evidence on the trial of the above-entitled cause on behalf of the above-named defendant. You can appear at the time and place aforesaid for taking said depositions and cross-examine said witnesses if you so desire. The taking of

said depositions will be continued from day to day until fully completed.

J. D. SPRINGER,
Att'y for Def't, Minneapolis, Minn.

89 Copy of the foregoing received at St. Paul this 25th day of November, A. D. 1884.

O'BRIEN & WILSON,
Pl'ff's Att'ys.

STATE OF ILLINOIS, } ss.:
County of Will, }

Be it known that I caused to come before me at my office in the city of Joliet, Will county, and State aforesaid, in pursuance of the annexed notice, the persons named therein, Samuel Fentrell and A. W. Fiero, on the fifth day of December, A. D. 1884, at the hour of nine o'clock a. m.; that each of said witnesses *were* then and there duly sworn by me to testify to the whole truth and nothing but the truth relative to the cause specified in said notice, and that each of said witnesses, after being duly sworn, testified as follows:

Deposition of Samuel Fentrell.

Int. 1. What is your name, age, occupation, and place of residence?

Ans. Samuel Fentrell; 47 years; superintendent steel-rail mill, Joliet Steel Co., Joliet.

Int. 2. Were you connected with the Joliet Rolling Mill in 1878; and, if so, in what capacity?

Ans. I was; mill superintendent.

Int. 3. State whether or not you are familiar with the process of making steel rails used for railroad track?

Ans. I am.

90 Int. 4. How many years' experience have you had in that business as a practical rolling-mill man?

Ans. 25 years.

Int. 5. What rolling-mills have you been connected with other than the one at Joliet?

Ans. I was with the Jenks Steel Co. in England for 12 years; then came to the Joliet mill. I was foreman, also, in the Vulcan Rolling Mill in St. Louis and foreman in the Pacific Rolling Mill for the manufacture of railroad iron in San Francisco.

Int. 6. State whether or not the process used in the manufacture of rails used by railroads is substantially and practically the same process adopted in England and America?

Ans. The process adopted by the different mills for the manufacture of rails for railroad, whether steel or iron rails, is substantially and practically the same, whether such manufacturers are in England or the United States.

Int. 7. Now, what was the process used in the manufacture of the steel rails made by the Joliet mills in 1878?

Ans. The process is known as the Bessemer process. The rail in

question is known as the Bessemer steel rail. The first step in the progress in making the rail is, break up, analyze, and select the best pig-iron from the mass. This selected pig-iron is then conveyed to the cupola, where it is melted with coke; then, when it is thoroughly melted to a liquid form it is run into a vessel. Cold air is then blown through this molten mass
91 for a space of 10 to 15 minutes for the purpose of burning out the silicon, carbon, and other impurities. It is then recarbonized by the addition of about 10 per cent. of spergel. The spergel referred to is a pure iron containing a large per cent. of carbon and manganese. This spergel is added to the molten mass for the purpose of converting the iron to steel. When thoroughly mixed this mass is poured from the vessel to a large ladle, thence run into molds about 14 inches square. When the metal in these molds is set the molds are removed. This leaves the metal in the shape which is called an ingot. These ingots are taken and placed in a heating furnace, and after being subjected to a certain heat are from there taken to the blooming rolls and rolled down into a seven-inch-square bloom, from whence it is taken to the shears and cut into proper lengths, and defects, if any discovered, cut out; from there it passes to the rolls, where it is finished into a rail. It is then sawn in proper lengths, straightened, and carefully inspected by the manufacturer.

Int. 8. Is the above process substantially and practically the method adopted generally throughout the United States and England for the manufacture of steel rails during the last 30 years?

Ans. It is.

Int. 9. What, if any, material is known that will give greater strength in the manufacture of these rails than that you have described?

Ans. There is nothing known.

92 Int. 10. What, if any, process has been discovered that will give greater strength and safety than that heretofore described by you in the manufacture of steel rails?

Ans. None.

Int. 11. What is the strongest, safest, and best rail now and in 1878 manufactured?

Ans. The Bessemer steel rail.

Int. 12. State whether or not the Joliet Rolling Mill since 1874 has made any other than the Bessemer steel rails.

Ans. It has not.

Int. 13. State whether or not different grades of the Bessemer steel rail have been or are manufactured in the Joliet mills.

Ans. No, sir.

Int. 14. What is now and has been the usual, general, and best test to determine the quality and safety of such rails with reference to strength and durability?

Ans. We consider the drop test. The drop test is made by placing a piece of rail on supports, striking it a blow, and deflecting it 2 inches to the foot—that is, subjecting it to a bend of 2 inches to

the foot. If it stands such a blow and deflection it is considered safe.

Int. 15. What, if any, test or process is known to ascertain if there exists an air chamber or other latent defect in the rails?

Ans. There is none known.

Int. 16. State whether or not there has been any discovery by which the safety, strength, or durability of steel rails is increased in the last twenty years.

93 Ans. There has not.

Int. 17. What, if any, process or material can be used in steel-rail making to lessen the dangers incident from frost and cold weather?

Ans. I know of none.

Mr. O'Brien: That question is objected to and the answer is objected to upon the ground that no foundation is laid for it. There is no evidence whatever of cold weather affecting this character of rail.

Mr. Davis: We cannot put in all the testimony at once. One of the witnesses for the plaintiff testified that the temperature was very cold at that time. We shall prove that that was a very cold night.

The Court: I think I will allow the question.

Exception by plaintiff.

Int. 18. What advantages, if any, have steel rails over iron, or other?

Ans. They are safer, stronger, and more durable.

Int. 19. What is the usual and probable length of time a steel rail can be safely used on a railroad during a reasonably large business?

Ans. Ten years, at least.

Int. 20. Please examine the piece of steel rail now shown you by J. E. Riley, of Nora Springs, and state what kind of a rail it is, where it was made, and when.

Ans. The rail now shown me by J. E. Riley, and in his possession, is known as a Bessemer steel rail, made by the Joliet Rolling Mills in 1878.

94 Int. 21. What better or safer rail was then or is now made in England or America?

Ans. None.

Int. 22. What, if any, defect now appears on an examination of this rail produced by said J. E. Riley?

Ans. The defect consists in an air-cell, which weakened its strength.

Int. 23. How would such a defect have been discovered during the process of its manufacture or after its completion?

Ans. It would have been impossible to have discovered it at any time, and the only way such a defect could have been discovered would be by breaking the rail in pieces.

Int. 24. What efforts have been used, if any, by which air-cells

could be discovered in the manufacture of railroad rails, to your knowledge?

Ans. I am personally aware that great time and expense have been used to discover some method or machinery by which the air-cells could be obviated or discovered, but thus far human ingenuity has failed.

Deposition of A. W. Fiero.

Int. 1. What is your name, age, occupation, and place of residence?

95 Ans. A. W. Fiero; 34 years; railway inspector for different railway companies in the United States; I live in Joliet.

Int. 2. What was your business in 1878?

Ans. I was in the same business.

Int. 3. State whether or not you are familiar with the process of making steel rails, and how much experience have you had in such business?

Ans. I am familiar with the process, and have had nine years' experience in and about such mills; I have been foreman of the rail making and finishing department for two years at the Vulcan Mills in St. Louis, Mo.

Int. 4. What rails are the best, safest, and most durable?

Ans. The Bessemer steel rails.

Int. 5. State whether that is the rail generally manufactured and adopted throughout England and the United States.

Ans. Yes, sir.

Int. 6. Now, please examine the pieces of rail handed you by J. E. Riley, of Nora Springs, Iowa, and state what kind of rail it is; where it was made, and when.

Ans. The rail examined and shown by him is a Bessemer steel rail, manufactured by the Joliet Rolling Mill in the year 1878.

Int. 7. What better or safer rail was then or is now made in England or America?

Ans. There is none, to my knowledge.

96 Int. 8. What defect or imperfection, if any, do you now see in the rail handed you by said Riley?

Ans. An imperfection in the center caused from an air-cell.

Int. 9. State whether or not such air-cell was discoverable prior to the time of its being broken.

Ans. There is no process known to human ingenuity by which such defect could have been discovered.

Int. 10. Is the Bessemer steel rail the kind that was uniformly and generally adopted by railways throughout the United States in 1878 and since?

Ans. Yes, sir.

Int. 11. State who inspected this rail before it was accepted by the defendant.

Ans. It was inspected by me at the rolling mills, personally.

Int. 12. Now, what test, if any, did you subject this rail to?

Ans. I subjected it to the usual and ordinary test generally

adopted throughout the United States—that is, by ascertaining its strength and durability by bending and surface inspection.

Int. 13. What other test is known than the one you applied to determine its quality, durability, and safety?

Ans. There is no other.

Int. 14. What was the result of your inspection?

Ans. I found it apparently as safe and durable as any rail I ever inspected.

97 Int. 15. What, in your judgment, caused the breaking of this rail?

Ans. In my judgment it was caused by an undiscoverable and unavoidable air-cell in the steel rail.

Int. 16. What, if any, process or material can be used to give greater strength and safety in railroad rails than that process of material used in the manufacture of the Bessemer steel rail?

Ans. I know of none.

Int. 17. What, if any, effect does cold or frosty weather have upon such rails?

Ans. It has a tendency to endanger the breaking of the rail.

Int. 18. What is the general reputation of the Joliet Rolling Mill among railroad men as to the quality of their manufacture of steel rails, if you know?

Ans. The reputation of this mill is first-class throughout the United States.

STATE OF ILLINOIS, }
County of Will, } *ss.*:

Be it known that I took the annexed depositions pursuant to the annexed notice on December 5th, 1884; that I was then and there a notary public in and for the county of Will, in the State of Illinois; that I exercised the power of that office in the taking of such depositions; that by virtue thereof I was then and there authorized to administer an oath; that each witness was duly sworn

98 to testify to the whole truth and nothing but the truth relative to the cause specified in the annexed notice; that the testimony of each witness was correctly read over to him by me before he signed the same; that the examination was conducted on behalf of the defendant by Samuel K. Tracy, Esq.; that no person appeared to examine said witnesses, or either of them, on the part of the plaintiff.

Witness my hand and seal this 5th day of December, A. D. 1884.

JOHN F. WILSON,
Notary Public.

Mr. O'BRIEN: Of course I have the right, if the connection isn't made between that rail and those depositions, to have them stricken out?

The COURT: I suppose you intend to connect the piece of rail they speak of with this matter?

Mr. SPRINGER: Oh, certainly.

A. T. HAY, sworn and examined on behalf of the plaintiff, testified:

Direct examination by Mr. SPRINGER:

Q. Where do you live?

A. I reside at Burlington, Iowa.

Q. What is your business?

99 A. I am engaged in the manufacture of steel.

Q. How many years' experience have you had?

A. Well, since 1877—5 years. I have devoted all my time to that business.

Q. Have you heard the testimony of these witnesses in the depositions as to the discovery of air cells in the manufacture of steel?

A. Yes, sir. Just read?

Q. Yes, sir.

A. Yes, sir.

Q. Will you describe to the jury the process of manufacturing the Bessemer steel rail, in a general way?

A. Well, similar to that set forth in the deposition.

Q. Just describe to the jury the method of manufacturing the steel rails—Bessemer steel rails.

A. Well, the first process is the selection of ores or the manufacture of a pig-iron.

Mr. O'BRIEN: I don't consider that this is material. There is no question as to the process spoken of in the deposition, and there will be no attack made on it. Now, is it necessary to repeat it?

Mr. SPRINGER: If that is so we will not take up the time. I will drop that part of it.

Q. You have heard the testimony of these witnesses as to this air cell in this rail?

A. Yes, sir.

100 Q. Now you may state what, if any, method has been adopted or discovered to discover the existence of such air cells in the process of manufacture or afterwards or to prevent the same?

A. There is none that I know of.

Q. Did you hear the testimony of these witnesses as to the tests adopted to determine the sufficiency, strength, and safety of the Bessemer steel rail?

A. I did.

Q. What other or different tests have been discovered or adopted to test that matter?

A. I know of no other in my experience around metals.

Cross-examination by Mr. O'BRIEN:

Q. Mr. Hay, are you a manufacturer of steel rails?

A. I am a manufacturer of steel rails under a certain special process by contract, not as the owner of a mill. I contract with mills.

Q. You are a patentee of some process for making steel rails?

A. Yes, sir.

Q. Railroad rails?

A. Yes, sir.

Q. Are you a practical man yourself or simply the owner of the business?

A. I have charge of the business when my process is run-
101 ning, so far as the running of it. I follow it up through the mill.

Q. What I mean is this: Are you a practical iron worker?

A. Yes, sir; from my boyhood. I can work steel in any shape you bring it to me.

Q. Do I understand you that there is no means of preventing the existence of air-cells in steel rails?

A. If you will allow me to go back to the manufacture of crucible steel——

Q. Well, I beg your pardon; I prefer not.

A. Well, then, in the manufacture——

Q. I ask you the direct question, if you please: Do I understand you that there is no known method by which air-cells can be prevented from existing in railroad steel rails?

A. No, sir; there is none. They are incidental——

Q. One moment——

A. They are not general, but they are incidental.

Q. Do I understand you to say that there is no known process and human ingenuity by which a railroad rail can be made that may have in it an air-cell of such character, extent, and description that when that rail comes to be used it will break in two under a train and there is no means of preventing it?

A. To go back to the period of the date of this rail——

Q. Please don't go back, but answer my question, if you
102 please. Do I understand you, as the sum of your experience, to say——

A. The sum of my experience——

Q. Will you please let me state my question?

A. I comprehend it; I know what you want.

Q. Do I understand you to testify that there is no known process and there is no human ingenuity which can prevent the occasional existence in a steel rail of an air-cell of such character and so large as to make that rail defective, so it will break in use?

A. For the past two years I, under my process——

Q. Won't you answer me as I ask you?

A. Well, will you allow me to come at it so I can explain to you how it comes?

Q. Will you answer me?

A. I will say at present we are endeavoring to make a rail of the metal of a plastic character, so that this pipe in the ingot (which may be as large as that cane or the size of a straw) will weld up under the Bessemer process—up as it is run. If there is a pipe forms it will never weld, and it will be found right in the center of the rail running from the base up sometimes nearly through the crown, and it is not seen for not discoverable.

Q. Will you answer my question now?

A. Well, what is the question? I say there was none under the Bessemer process.

Q. Is there any other process—any other iron or steel process—which will produce a better rail?

103 A. We are working at such a process, and we have got some 20,000 tons in practical work since commencing in 1884. Up to this time we have found no pipe rails nor no air-cell rails.

Q. That is under your process?

A. That is under my process.

Q. Then your rail has not those defects?

A. So far, we think so. It has not become a standard rail yet; the Bessemer is the standard rail until that is adopted.

Q. You have been making it how long?

A. About two years.

Q. And the factories in Burlington?

A. No, sir.

Q. You reside in Burlington, however?

A. I reside in Burlington.

Q. Your rail is generally known there?

A. My rail is known pretty generally among railroad men in the western country.

Q. Burlington is the home division of this railroad?

A. It is my home.

Q. And it is the home of the Burlington, Cedar Rapids & Northern Railroad Company also, is it not?

A. Well, it is the Burlington, Cedar Rapids & Northern Railroad Company; I don't know much about it.

Q. Mr. Hay, will you be kind enough to inform me whether or not there is a difference in the weight of rails?

104 A. Yes, sir; we make several sizes at the mill where I do my business.

Q. What is the reason of making one rail heavier than another?

A. The reason is that railroad engineers see fit to adopt it so. Some rails have heavier traffic than others; a light rail will do for many years for a light traffic, and a large traffic needs a larger rail.

Q. Speaking of the question of safety, will you state whether or not modern experience has discovered that the heavier rail is the better rail?

A. That would depend entirely upon the extent of the traffic, the weight of the engines, and the cars you carry over it.

Q. Do you mean to say that it is not the modern doctrine that the heavier the rail is the better it is?

A. It will last the longer; that is the basis they work upon.

Q. Isn't it better for safety?

A. Well, it wouldn't be consistent to use a 70-lb. over a light-traffic road.

Q. Do you know how much the weight of rails has increased since the discovery of rails?

A. No; I don't know as I can tell you how much it has increased.

Q. Do you know what the original rail was?

A. The standard rail, in Bessemer work, about the time that the Bessemer rail was introduced into this country, my recollec-
105 tion is, was 56 pounds. Now, certain roads use a 60-pound rail; some use a 63, others a 66, others a 68, and one road that I make rails for uses a 70-lb. rail.

Q. Now, sir, don't you know that this matter of railroad rails has gone on increasing; that the size of the rail and the character of the material has gone on increasing both in the size of the rail and the durability of the material; that the original rail was a strap of iron; that they have gone on until they have finally adopted these enormous steel rails as being the best?

A. Well, when the strap-iron rail was used my recollection is we had about a 70-ton engine then to run over it.

Q. Well, isn't that the fact?

A. They have gone on increasing both in the traffic, the weight of the engines and the weight of the cars, and the size of the rail has been uniform right along.

Q. Mr. Hay, what is the purpose of your present visit to this city?

A. I was called here.

Q. As a witness on the part of the defendant?

A. Yes, sir.

Q. What is your business here?

A. That is my business here.

Redirect examination by Mr. SPRINGER:

106 Q. Do you know what a 56-pound steel rail was worth in the market, at Joliet, in the fall of 1878?

Objected to as immaterial.

Mr. SPRINGER: I propose to show that the heavier the rail the more it costs, and the greater the number of tons it takes to the mile, and I propose to show, also, that the cost of the steel rail is such as to make it wholly impossible for those rails to be taken up and heavier rails substituted.

Objected to as immaterial and too remote. Objection sustained. Defendant excepts.

Q. What railroads in this country were using the 56-pound Bessemer steel rail in the beginning of the present year?

A. The C., B. & Q. uses some 56's; it is difficult for me to name the roads that is using it, but about one-fourth of the output of the mill where I am is 56-pound rails.

Q. I ask you in a general way what proportion of 56-pound rails are used in this country; what proportion of rails consist of 56-pound rails?

A. Fully, I should think, one-fourth.

Q. At the beginning of the present year?

A. At the beginning of the present year.

Q. Now, where it is not used why is it not used?

A. It is on the main lines of roads like the Chicago & Alton, the Chicago, Burlington & Quincy, and others having heavy traffic and double tracks. They are taking up all their light rails and
107 substituting 66, and 68, and 70 pound rails, and sending their lighter rails to where the traffic is lighter—on branch roads.

Q. What do they do in the way of increasing the weight of their rolling-stock where the rail is increased in weight?

Objected to as immaterial. Objection overruled.

A. Well, instead of the 30-ton engine they use 40-ton engines; instead of the 12-ton cars they have cars that will carry 20 tons—labeled 40,000 pounds, marked on the side of them.

Recross-examination by Mr. O'Brien:

Q. Mr. Hay, do they increase the size of the rail on account of the heavy rolling-stock, or do they increase the weight of the roliing-stock on account of the increased weight of the rail?

A. Well, that is the difference between cause and effect. Causes both to work; one implies the other, is all I know.

Q. Counsel asked you whether or not they were increasing the weights of the rails, and you stated that they were; you said on roads where they were doing a large traffic they were increasing up to 70-pound rails; he then asked you what they were doing in relation to rolling-stock; you said they were increasing it; now, I ask you as an expert—asking you fairly as a railroad man—whether or not the increase in the weight of the rolling-stock is due to
108 the fact that it can be used with safety on the heavier rail, or whether they are making the heavier rail because of the increased demands of the rolling-stock?

A. They were both brought about by increased traffic over the road at less cost.

Q. Now, then, is it not a fact that the light rail has been found insufficient for the modern rolling-stock, which has been increased so much in weight?

A. No; not to an extent of any great percentage; my experience that I have—roads that I have business with or ride over—there are many places where they are using the 60-pound rail yet, and removing them and replacing with heavier.

Q. Well, then you don't think that the increase in weight in rolling-stock necessitates a heavier rail?

A. Yes, I think it necessitates a heavier rail, but not immediately so. These things are — go——

Q. Until they have 3 or 4 accidents?

A. — in the line of business.

Q. Until after the train has jumped the track 5 or 6 times?

A. I know of railroads where they have been putting down new tracks and there has been no jumping of the track or broken rail, to my knowledge.

Q. And isn't it a fact that the heavier rolling-stock that they are

now using, in its ordinary use, ordinarily requires—common prudence suggests that it requires a heavier rail than a 56-pound rail?

A. I think it does.

Q. Yes, sir?

109 A. I think it does; and the roads are putting them down.

Q. Now, do you know anything about this road in question here?

A. Nothing particularly; I know the road; I have been over it a few times in my life.

Q. Isn't it true that the rolling-stock on that road, the engines and the cars that are used, are among the heaviest rolling-stock that is used?

A. Well, I really couldn't say as to the weight of the cars on it; I went over it as a passenger.

Q. Well, how about the engines?

A. Well, they have got first-class engines, but I never saw a Mogul engine on the road—the big, heavy engine.

Q. Is that the mountain engine?

A. No, sir; it is a six-wheel engine; it is a 45-ton engine that they use on these main lines.

Q. Haven't they got the modern large passenger engine?

A. Why, I think they have a 35 or 40 ton engine; first class and complete.

Q. Isn't it true also that they use sleeping cars—the heaviest known? Don't they use the Pullman sleeping cars?

A. They use the Pullman sleeper; yes, sir.

Q. Don't they use the dining car?

A. I never was on one; they may have them; have never seen them.

Q. You have seen their freight cars?

110 A. Passing, I have.

Q. Haven't they got freight cars on with the modern capacity of 30,000 to 40,000 pounds?

A. I couldn't say whether they have or not.

Q. Isn't it your best judgment that they have?

A. I have no judgment to make; my judgment is predicated on some knowledge, and I have no knowledge of the facts.

Q. Don't they use on that road, to your knowledge, the very largest coal cars that are used in the Northwest?

A. No; not to my knowledge, they don't.

Q. Do you say they don't?

A. Not to my knowledge; I don't know what the capacity of their coal cars are; I have seen coal trains passing Burlington.

Q. Haven't you seen those through cars?

A. Well, not being interested in it, I haven't examined as to the weight of the cars.

Q. Do you know the capacity of the coal cars?

A. The largest coal cars carry about 20 tons on the Chicago & Northwestern road.

Q. Don't you know that they use those same 20-ton cars on this road?

A. I do not, sir; it may be so, but I haven't examined it.

Q. Do you know that this road taps one of the leading coal-mining districts in the State of Iowa?

A. Yes, sir; but I do not know that I have mined and shipped coal on 10-ton cars.

111 Q. Will you testify that they are running a single 10-ton car on this road?

A. No, sir; I don't know anything about it; whether it is 10, or 20, or 30. I have seen coal, though, on a 10-ton car.

Q. Have you seen any 10-ton cars running on this road in the last 2 or 3 years?

A. I tell you I don't know anything about it.

Q. When did you see, in a coal traffic on the main line of a road, a 10-ton car used; how many years ago?

A. Well, it has been a good many years since I was in the coal business, and then I observed those things closely.

Q. How many years was it?

A. Well, I have not been in the coal business for 20 years.

Q. That referred to railroad equipments as they were 20 years ago?

A. That was an iron rail.

CHAS. F. HATCH, sworn and examined on behalf of the defendant, testified:

Direct examination by Mr. SPRINGER:

Q. Colonel, where do you reside?

A. Minneapolis.

112 Q. What is your business?

A. President of the Wisconsin, Minnesota & Pacific Railway Co.

Q. How long have you been a railroad man?

A. 30 years.

Q. Where?

A. In various parts of the country.

Q. Pretty much all over the United States?

A. Over the northern part of the United States.

Q. In what capacities?

A. In various capacities; from clerk in the offices up to president and general manager—general superintendent.

Q. What road in the West have you been either general manager or general superintendent of?

A. In the Northwest I have been general manager of the Minneapolis & St. Louis and general superintendent of the Chicago, St. Paul, Minneapolis & Omaha.

Q. What road were you connected with, and for what length of time, running into Chicago?

A. With the Lake Shore & Michigan Southern road.

Q. For about how long?

A. About 16 years.

Q. And in what capacity?

A. In various capacities. The last there I was general superintendent of the line.

Q. Of the whole line?

A. Yes, sir.

113 Q. What have you had to do in your railroad experience with the construction of railways, if anything, or have you had anything to do with the construction of railways?

A. Yes, sir.

Q. To what extent?

A. Well, I have had charge of building various roads.

Q. Well, generally, how many miles?

A. Well, somewhere between 500 and 1,000 miles.

Q. In the latter part of 1878 did you know the reputation of the steel rail manufactured by the Joliet company that furnished the steel for the Burlington, Cedar Rapids & Northern?

A. Generally, I knew the reputation of the Joliet steel; at that time I don't know as I had used any of it, personally, but I knew of it generally.

Q. Had you seen it on railroads?

A. Yes, sir.

Q. Seen it in use—what was its reputation for safety and durability in the fall of 1878?

A. It was good.

Q. I will ask you whether you knew or have been acquainted, in a general way since 1878, with the character or the extent of the traffic on the Burlington, Cedar Rapids & Northern railway between Cedar Rapids and Albert Lea as compared with the Chicago, Burlington & Quincy, the Chicago & Alton, and the Chicago & Northwestern on their main lines?

Objected to as immaterial.

114 The COURT: I doubt whether it is material.

Objection sustained. Exception by defendant.

Q. What railroads for the past five years preceding March of the present year in the West were laid with 56-pound steel rails?

A. Well, of my own knowledge, I know since that time the Chicago, St. Paul, Minneapolis & Omaha was laid with 56-pound steel, and the Minneapolis & St. Louis was laid with 56-pound steel.

Q. What was the ruling weight of steel rail generally used during the past five years prior to March 1st of the present year in western railways?

A. I should judge that 56-lb. would be about the ruling weight of rails.

Cross-examination by Mr. O'BRIEN.

Q. Mr. Hatch, the Minneapolis & St. Louis railroad is the connecting link with this Burlington, Cedar Rapids & Northern, isn't it?

A. Yes, sir; it is.

Q. They meet at Albert Lea?

A. Yes, sir.

Q. And one is really a prolongation of the other?

A. An extension of the line; yes, sir.

Q. Do you know how many wrecks have occurred on the Minneapolis & St. Louis railroad during the two years that counsel has spoken of?

115 Objected to as immaterial and incompetent and not cross-examination. Objection sustained.

H. F. WHITE, sworn and examined for the defendant, testified:

Direct examination:

Q. Where do you reside?

A. Cedar Rapids, Iowa.

Q. What is your business?

A. Chief engineer of the Burlington, Cedar Rapids & Northern.

Q. How long have you been chief engineer?

A. Three years last November.

Q. How long have you been connected with the road?

A. Between 8 and 9 years.

Q. Were you connected with the road at the time the steel was laid at the place of the accident?

A. Yes, sir.

Q. When was it put down?

A. Some time in 1878, in the fall; I don't know the exact month.

Q. What is the degree of curvature at the place of the accident?

A. As near as I can tell—we have no maps of the road,
116 but I should judge it was not to exceed a 1-degree curve.

Q. And how long is it?

A. Well, it is somewhere about a mile, I should think.

Q. How far was the place of accident from either end of the curve?

A. As to that I cannot say exactly; I was not on the ground until wreck had all been cleared up.

Q. Well, was the place of the accident pointed out to you by anybody?

A. Yes; it was some distance from the end of the curve; I couldn't say how far.

Q. How far?

A. Well, I should think from 800 to 1,000 feet.

Q. From 800 to 1,000 feet from the end of the curve?

A. Yes, sir.

Q. How much, if any, of a fill is there or was there at the place of the accident?

A. My recollection is that there was between 3 and 4 feet.

Q. Have you been on other railways in traveling over them?

A. Yes, sir.

Q. What has your business to do with a knowledge as to the character of rails?

A. All the rails that are bought by our company the bills pass through my hands, and I have charge of all the track on the road.

117 Q. You may state how general the Bessemer steel rail is used—fifty-six-pound steel rail is used—in the West.

A. Well, in my judgment it is used on nearly all roads excepting on the trunk lines that do the very heaviest business.

Q. How does the volume of business on this road compare with the roads that adopt heavier rails?

Objected to as irrelevant; no foundation laid. Objection sustained. Defendant excepts.

Q. Have you a general knowledge of the amount of business on this road at and prior to the time of the accident in question?

A. I have, in a general way.

Q. Now, how did the volume compare at the time and prior to the time of the accident in question with that on roads that used a heavier rail than the 56-pound steel rail?

Same objection. Objection sustained. Exception by defendant.

Cross-examination by Mr. O'Brien:

Q. Mr. White, you say that you are in charge of the track of this road as chief engineer?

A. Yes, sir.

Q. And have been how long?

A. A little over three years.

118 Q. Did you lay this track?

A. No, sir; it was laid before I had charge of it.

Q. Well, was it laid under your supervision?

A. No, sir.

Q. It has been laid more than three years, then?

A. Yes, sir.

Q. Do you know how long it has been laid?

A. It has — laid a little over five years.

Q. Do you know how much over five?

A. No; it was laid, I think, in the fall of 1878—that is, the steel was put down.

Q. That would come very near being six, wouldn't it?

A. Yes, up to the present time.

Q. You found that rail there when you got there—when you took charge of the road you found that rail laid down?

A. Yes, sir.

Q. What inspection did you make of the road when you took charge of it?

A. I made no——

Objected to as not cross-examination and immaterial.

The Court: I think it would be proper to ask him what he knows about it.

Q. What inspection did you make of this road when you took charge of it?

Same objection.

The Court: I think it is proper.

119 Q. What inspection did you make?

A. I have made no particular inspection of it, because I have been on the road, and knew generally the whole road.

Q. Have you ever been on an inspection tour over that road since you took the position as chief engineer?

A. Over different parts of it; yes, sir.

Q. You say there are no maps of your road-bed?

A. No maps of that part.

Q. There are no maps in your office of that part of your road?

A. There are pieces of maps. It was an old road when the present company took it, and the maps and surveys have been destroyed; never could be found.

Q. You have got no survey to show the exact dimensions of this curve, or anything of that kind?

A. No, sir.

Q. Without going down and making the necessary measurements you couldn't describe the different points upon this road, or the conditions or character of the road or curves, for the benefit of this court?

A. I couldn't swear to them.

Q. You have never taken the trouble to make such a location, have you?

A. No, sir.

Q. Now, will you please state to the jury what observation you have given the scene of the accident since the accident?

120 A. I have been over the road in a special car; when we got to that place they slowed up; went slow by it, looking at it.

Q. Is that the extent?

A. That is the extent.

Q. Have you ever had any examination made of it by any of your subordinates?

A. The road-master.

Q. Any of the subordinates of your office; I mean—any civil engineers?

A. No civil engineers; the road-master.

Q. He examined it the same way, didn't he—slowed up and went on?

A. No, sir; he was there in person.

Q. That is the extent of the examination that you made. How far is it from the scene of this accident to your general office?

A. Somewheres, I believe, — 85 or 90 miles.

Q. When was it, with reference to this accident, that you took the special car and had them slow up while going over this place?

A. It was some time early in the spring; don't remember the exact date.

Q. What was the object of slowing your special car at that quarter?

A. Just to see the place.

Q. How much did you slow down to?

A. I don't know.

Q. Well, your best recollection?

A. Perhaps eight or ten miles an hour.

121 Q. You didn't slow down for fear your car would go off, did you, but simply to enable you to inspect the scene where four of your cars had been thrown over the right of way and injured the passengers?

A. Yes, sir.

Q. That is the extent of your inspection. Who was your section boss for that section of the road?

A. A. E. Stirts.

Q. How long was he section boss there?

A. I don't know exactly; I don't keep the record of dates.

Q. Do you know the man when you see him?

A. Yes, sir.

Q. What is his business, aside from being section boss?

A. That is all the business he has.

Q. Is he a laborer?

A. He is a laborer as much as any foreman is.

Q. Has he any special skill?

A. He is simply the foreman of the section.

Q. What is the number of that section?

A. I don't know the number of it.

Q. Is there anything in your office that would show the number of that section?

A. Yes, sir.

Q. Did you ever know the number of it?

A. I did know, but the numbers have been changed lately, and I don't keep the record of them. That is left to the road master.

122 Q. Is this the same man—the section foreman? Was he the section foreman at the time of the accident?

A. Yes, sir.

Q. How much of a crew did he have at that time?

A. I cannot say what he had then.

Q. You don't know how many men he had?

A. No, sir.

Q. What are your orders to your section foremen in relation to their duties? What are their hours of duty?

A. Their hours of duty are from 7 to 6, with an hour out at noon.

Q. Do you know what a track-walker is?

A. Yes, sir; what we call a track-walker or night watchman is a man that goes over the track in the night.

Q. Do they ever go over it in the day-time?

A. A regular section gang goes over it in the day-time.

Q. Do they go over it in the night?

A. We don't have any.

Q. Did you ever have any?

A. I don't recollect that we did.

Q. You never have them day or night?

A. Yes, sir; we have had them at night in some places sometimes.

Q. Did you have any at this point at the time of the accident?
A. No, sir.
Q. Had you had them before?
123 A. We have never had them since any steel has been laid there.
Q. What means have you of ascertaining a defect in the rail—anything except the occurrence of an accident?
A. The section man is supposed, through the day, to be over this section some time during the day observing things.
Q. That is the only means of informing your office of the condition of your rails prior to the time you receive notice of an accident?
A. My office isn't informed at all; it is the road-master that tends to that business.
Q. Well, your office is in charge of the track?
A. I have charge of that, but all these things are reported direct to the road-master; he is the man that is held responsible for that.

Redirect examination:

Q. What necessity was there for a track-walker at the place of this accident, or prior thereto?
A. I don't think there was any.
Q. Where is it that track-walkers are used?
A. We use track-walkers wherever we have iron rails that trains run over in the night, or any place on steel rails where the road-bed is in bad condition temporarily.
Q. What kind of ties were in the track at the place of the accident?
124 A. I have no knowledge of the ties there any more than it was on a curve, and our curves are laid with oak ties, generally.
Q. What kind of road-bed was that—how was it built, of what material; how ballasted?
A. It was built of the natural soil and then ballasted with a carload of gravel to a place.
Q. What was its condition at the time of the accident?
A. From reports that were made to me in regard to it——
Q. Well, if you have no personal knowledge you needn't state.
A. No.

J. P. Forrest, recalled on behalf of the defendant, testified:

Direct examination by Mr. Springer:

Q. Mr. Forrest, where do you live?
A. Albert Lea.
Q. What is your business?
A. Conductor.
Q. On what road?
A. Burlington, Cedar Rapids & Northern?
Q. That is the defendant?
A. Yes, sir.

Q. Were you the conductor in charge of the train at the time of the accident to the plaintiff here?

125 A. Yes, sir.

Q. How long have you been a conductor?

A. 8 years.

Q. On what roads?

A. The Burlington, Cedar Rapids & Northern.

Q. What railroad experience did you have before that time?

A. 5 years.

Q. Where?

A. On several roads; on the Northwestern and Michigan, Western Union & Illinois, and Burlington, Cedar Rapids & Northern.

Q. How far is it from Waterloo to the place of the accident?

A. About 37 miles, or 36½.

Q. What time did the accident happen?

A. 1.15, I believe.

Mr. DAVIS: At night?

A. Yes, sir.

Q. Did you make a record of it at the time?

A. Yes, sir.

Q. Is that the correct time?

A. That is the correct time.

Q. At what time did you leave Waterloo?

A. I couldn't say as to that exactly.

Q. Well, about what time?

A. About 11.35 or 11.40.

Q. Now, when your train left Cedar Rapids, how much was it late in getting out?

A. About 20 minutes.

126 Q. How much were you late at the place of the accident?

A. Fifty.

Q. Why?

A. Couldn't make the running time on account of the engine not steaming.

Q. Well, was there a head wind?

A. Yes, sir; a steady wind.

Q. Was it a strong wind?

A. Yes; quite a wind.

Q. Between Cedar Rapids and the place of the accident you lost 30 minutes?

A. About that.

Q. Now, what kind of a night was it as to temperature?

A. Well, it was very cold; I don't know how cold.

Q. It was very cold?

A. Yes, sir.

Q. Anything to call your attention to that fact?

A. Well, getting out at stations; and after the wreck, around there.

Q. What was it that called your attention to the fact that it was cold?

A. That it pinched my ears, principally.

Q. Now, between Waterloo and the place of the accident you may state whether you were delayed at any stations.

A. No delay more than five minutes, to my recollection.

127 Q. The usual time?

A. We made 2 stops.

Q. Now, what, if any, train was met at Greene?

A. I was to meet No. 6 there that night.

Q. What train is that?

A. That is the other passenger south; the Chicago passenger.

Q. That is what is called the cannon-ball train?

A. Yes, sir.

Q. The train that leaves Minneapolis at seven o'clock?

A. Yes, sir.

Q. Now, what time was that train due at Greene?

A. 1.33.

Q. And had you the right to go beyond Greene before the train arrived?

A. No, sir.

Q. You were required to wait there for that train, were you?

A. Unless special orders.

Q. Unless you was ordered otherwise; had you received any orders otherwise prior to the time of the accident?

A. No, sir.

Q. How far is the place of the accident from Greene?

A. It is about 2½ miles.

Q. Which direction?

A. South.

128 Q. How many miles an hour was your train running at the time of the accident, or just before?

A. Well, my best judgment would be about thirty miles an hour; I couldn't swear to within a few miles.

Q. Well, what station did you stop at last before the accident?

A. Clarksville.

Q. And how far was that from the place of the accident?

A. It was 8½ miles.

Q. Now, what time did you have to get from Clarksville to Greene?

A. With reference to what; the other train?

Q. Yes, sir; I believe you stated the time it was due there.

A. I don't know what time I left Clarksville, exactly; about half an hour, I know; probably 35 minutes.

Q. How far is it from Clarksville to Greene?

A. 11 miles.

Q. Now, were you running at a usual or unusual rate of speed at the time of the accident?

A. It was about the usual rate—slower, if anything.

Q. Was it a safe or unsafe rate of speed?

A. Safe.

Q. You would call it safe?

A. Yes, sir.

129 Q. Now, were you trying to make any time to exceed your schedule time?

A. No, sir.

Q. Was there any reason for your trying to exceed it?

A. No, sir.

Q. How many cars were in your train?

A. 4 cars.

Q. What were they?

A. A baggage car, smoker, coach, and sleeper.

Q. How many passenger coaches?

A. 2; with the sleeper, 3.

Q. Well, was the baggage car a combination car?

A. No, sir.

Q. One of the passenger coaches was a combination, was it?

A. No, sir.

Q. Which was the smoker?

A. One of the passenger coaches.

Q. How soon did you get onto the ground after the accident?

A. Oh, I couldn't say exactly the length of time; as soon as I could get out of the car.

Q. How long were you about the scene of the accident that day, altogether?

A. I think I was there 2 hours.

Q. Were you there in daylight?

A. Yes, sir.

Q. Where did the sleeper stop with reference to the broken rail?

130 A. It was about 100 feet north of it.

Q. And where were the passenger coaches with reference to the sleeper?

A. The first-class coach was right opposite the sleeper, on the other side of the track.

Q. The first-class coach?

A. Yes, sir.

Q. That is the one next to the sleeper?

A. Yes, sir.

Q. The one next to that, where was that?

A. That was about fifty or sixty feet north of the sleeper.

Q. Now, where was the baggage coach?

A. That was probably about the same distance ahead of the sleeper.

Q. Was that off the road-bed; off the track?

A. The baggage? Yes, sir.

Q. Was it off the road-bed?

A. No, not clear off; it was attached to the engine.

Q. Where was the engine?

A. On the track.

Q. Was the tender on the track?

A. Yes, sir, except one pair of wheels.

Q. Now, how far did the passenger coach next to the sleeper run along the road-bed before it left the road-bed?

A. It ran about eighty or ninety feet, I should judge.

131 Q. Do you know how far the coach next that—the smoker—ran along the road-bed before it went clear off the dump?

A. No, sir.

Q. You couldn't tell about that?

A. No, sir.

Q. That was ahead, however, of the coach next to the sleeper?

A. Yes, sir.

Q. Did you examine the track after the accident to see what the cause of the accident was?

A. I did.

Q. What was it?

A. It was a broken rail.

Q. What other cause, if any, was there?

A. There was none that I could discover.

Q. Did you look to see if there was any other cause?

A. Yes, sir.

Q. What was the character and condition of the cars with reference to being first-class or otherwise; safe cars or otherwise?

A. They were first-class.

Q. Did you look at the ties in the track at the place of the accident?

A. Yes, sir.

Q. What kind of ties were they?

A. Oak ties.

Q. What kind of a curve was that at the place of the accident?

A. It wasn't much of a curve; a slight curve.

132 Q. About how long is the curve?

A. Oh, I couldn't say, exactly.

Q. How far from the end of the curve was the place of the accident?

A. I couldn't say as to that; several hundred feet.

Q. Did you hear the testimony of the witness about the rails having spread there at the place of the accident; what was the fact about it?

A. That the rails spread?

Q. Yes.

A. The rails were not spread; wasn't moved outside of the spike.

Q. This broken rail; you may state whether the base of that rail was knocked off the ties, or whether it remained spiked on.

A. It remained in the position, excepting about 4 or 5 inches of it.

Q. Did you examine the rail to see why it broke?

A. I examined it; I couldn't say why it broke, though.

Q. How long had you been running between Albert Lea and Cedar Rapids on this road?

A. Well, I have been running more or less for 11 years.

Q. Do you know whether that was a new rail or not; that broken rail?

A. I couldn't say.

Q. Whether it had been down some time?

133 A. Well, from its appearance I should think it had been down some time; I couldn't say how long.

Cross-examination by Mr. O'BRIEN:

Q. What was the weight of this rail; was it a 56-pound rail?
A. I don't know.
Q. You don't know the weight of rails, then?
A. No, sir.
Q. Could you tell a 56-pound rail from a 70-pound rail?
A. Oh, yes.
Q. Can you tell a steel rail from an iron rail?
A. Yes, sir.
Q. Is it because you cannot tell the weight of a rail, or because you didn't look at it enough to inform yourself; which?
A. Well, I know about the weight of rails in the track, of course.
Q. Well, I am speaking about this track.
A. That special one I couldn't say.
Q. If you had examined it closely would you know—would you be able to tell; or do you know the difference between weights of rails well enough to be able to tell if you look?
A. I could tell within 8 or 10 pounds.
Q. Then, if you had examined this rail with sufficient accuracy you could have told whether it was a 56-pound rail or not;
134 the reason you don't know is because you didn't examine it sufficiently to inform yourself?
A. Oh, no; my judgment would be it was a 56-lb. rail; but I wouldn't say.
Q. I say if you had looked at it closely you could have told, couldn't you?
A. I looked at it very closely.
Q. Then it is because you don't know the difference between a 56-lb. and a heavier or lighter one that you can't tell?
A. That is it.
Q. Now, Mr. Forrest, when did you say you left Waterloo that night?
A. Well, I left there about 40 minutes late.
Q. What time did you leave there; what was your actual leaving time?
A. I couldn't state.
Q. You reported your train, didn't you, from Waterloo?
A. No, sir.
Q. You didn't report yourself there late?
A. No, sir.
Q. Is it any part of the duty of the station agent to report you?
A. Yes, sir.
Q. Your company has got the exact record of the time—should have—that you arrived there?
A. Yes, sir.
Q. Now, what was it; can you tell?
A. I cannot.
135 Q. When should you have left there?

A. 10.51.
Q. And you think you were some 40 minutes late?
A. Yes, sir.
Q. When you got to Shell Rock how were you?
A. About the same.
Q. Did you have any special orders to stop there at Greene that night?
A. No, sir.
Q. My learned friend inquired of you the length of time you had to get from Shell Rock to Greene, and you had half an hour to avoid No. 6 coming down?
A. Yes, sir.
Q. Was Greene a regular stopping place?
A. No, sir.
Q. Well, how did you come to have that length of time if you were 40 minutes late; if you were behind 40 minutes, and if you were on time regularly you wouldn't have that time, how did you happen to have that time?
A. Well, I will have to explain the rights of trains to have you understand that, perhaps.
Q. Had you orders to wait for No. 6 at Greene?
A. I didn't need them; I couldn't proceed without them—without orders to proceed.
Q. Then you, being 40 minutes late, expected that you
136 would, necessarily, have to stop at Greene, without having special orders, and wait for No. 6?
A. Yes, sir.
Q. And that you would have to wait a half hour?
A. Oh, no.
Q. What would have been the time of No. 6 down there?
A. 1.33; I would have got there about 1.20.
Q. What is the next station after you leave Waterloo coming north?
A. Cedar Falls.
Q. What time did you leave that?
A. I don't know.
Q. What is the next station coming north?
A. Norris.
Q. What time did you leave that?
A. I don't know.
Q. What is the next station coming north?
A. Winslow.
Q. What time did you leave that?
A. I couldn't tell you.
Q. What is the next station coming north?
A. Shell Rock.
Q. What time did you leave that?
A. The same answer; I couldn't tell you the exact time.
Q. Do you say you stopped at Clarksville?
A. Yes, sir.
Q. What time did you leave that?

A. I couldn't tell you.

137 Q. How do you fix the time of the accident?

A. I looked at my watch.

Q. When, with reference to the accident?

A. Immediately after I got off the car; as soon as I got off the car.

Q. At what time was it?

A. 1.15.

Q. Your watch was still running?

A. Yes, sir.

Q. Where were you when this accident took place?

A. I was in the first-class car near the back end.

Q. Were you hurt?

A. Not much; bruised a little.

Q. Nothing more than that?

A. No, sir.

Q. The first thing when you got out was to look at your watch and fix the time?

A. Yes, sir.

Q. It looked at that time as though it was a pretty extensive accident; it looked like a pretty bad wreck, didn't it?

A. It did, indeed.

Q. You had a pretty large load of passengers?

A. 47.

Q. The cars all went off the track except the sleeper?

A. The sleeper went off, too.

138 Q. Some of them were thrown over the right of way. It looked like a pretty bad wreck?

A. Yes, sir.

Q. You had a large number of women and children in that coach you were in?

A. Yes, sir.

Q. The first thing you did when you got out that car was to fix the time; your governing idea was to fix the time of that accident?

A. Yes, sir.

Q. You were pretty cool, then?

A. In order to protect my train from the other train.

Q. In order to protect your train; there wasn't much to protect, was there?

A. Well, to protect the other train; my engine was still on the track.

Q. In order to protect the other train; but your engineer has a watch, doesn't he?

A. Yes, sir.

Q. He has a timepiece; was he supposed to be accurate?

A. Yes, sir.

Q. Particularly when he was left on the track; you would suppose ordinarily that an engineer would protect his engine, wouldn't you?

A. We don't suppose anything in railroading at all.

Q. Wouldn't it be his duty to protect his engine under those circumstances?

A. It would be; yes, sir.

139 Q. And under those circumstances would he have control of his engine?

A. No, sir.

Q. He would have to wait orders from you?

A. Yes, sir.

Q. He would protect it without orders, though, wouldn't he?

A. He would if he was able to.

Q. Supposing that you had been killed right then, the business would have gone right along with the engineer?

A. He would protect his engine; yes, sir.

Q. Did you send any orders to the engineer to protect his engine?

A. No, sir; I sent a man to protect it for him.

Q. Who did you send?

A. I sent Mr. Kiley, the road-master.

Q. You sent him?

A. Yes, sir.

Q. Wasn't he your superior officer?

A. No, sir.

Q. Aside from your train, didn't he rank on the road?

A. No, sir.

Q. Was he an employee of your train?

A. No, sir.

Q. Do you mean to tell me that the road-master of this defendant was under your orders that night?

A. He was at that time; yes, sir.

140 Q. As a volunteer?

A. No; not particularly so.

Q. And you sent him out to protect the train?

A. Yes, sir.

Q. You didn't send any of your brakesmen?

A. No, sir; I had to send him the other way.

Q. Who were your brakesmen?

A. John Forrest.

Q. How many did you have?

A. Only one.

Q. Where is he?

A. He is on the road yet.

Q. Is he here in court?

A. I think not.

Q. Did you know where he was when the accident occured—what car?

A. Yes, sir; he was right by me.

Q. Now, you say you were running at the rate of about 30 miles an hour?

A. Yes, sir.

Q. What is your regular running time?

A. 27½.

Q. Then you were running, according to your statement, some 3 miles over time; what were you doing that for?

A. Our regular card-time is 27½ miles an hour, including stoppages; that would necessitate running about 33 miles an hour to make time; that is about the usual rate of speed.

Q. Then you were running slower than usual?

141 A. Yes, sir.

Q. You were not attempting to make time in any shape or form?

A. We were trying to make the best time we could.

Q. You were not trying to increase the rate of your speed over the ordinary speed?

A. No, sir.

Q. You had no reason, no object, in doing it?

A. No, sir.

Q. The fact is, I should judge from your statements that you had to kill time more than anything else; you were going to have so much more time on your hands when you got to Greene?

A. We would have had 10 minutes dead time when he got there.

Q. When you looked at this locality how soon did you examine it after the accident?

A. I couldn't say; just as soon as I got the passengers taken care of.

Q. Was it that night?

A. Oh, yes.

Q. Did you make any examination the next day?

A. Yes, sir.

Q. Which examination do you rely on here in your description, the one made at night or the one made the next day?

A. Well, both.

Q. Who was your engineer that night?

142 A. John Kimbro.

Q. Where is he?

A. He is here in court.

Q. Who was his fireman?

A. I don't recall his name.

Q. Do you know what the engine was—what the number of the engine was?

A. 17, I believe.

Q. Did you give any statements or account of this accident to anybody after it took place?

A. Yes, sir.

Q. Do you remember giving one to a newspaper down there; an editor of the paper at Greene?

A. No, sir, I don't.

Q. You did not?

A. Not knowing him to be such.

Q. Did you make any statements concerning the speed that you were running at, or what you were doing?

A. I think I did.

Q. Now, sir, do you know the Butler County Press?
A. Yes, sir.
Q. Published by George E. Delevan?
A. Yes, sir.
Q. Do you know Mr. Delevan?
A. Yes, sir.
Q. Did you talk with him about the matter?
A. I did.
143 Q. Did you give him an account of this accident; did you have a talk with him after this accident?
A. Yes, I did; the next day.
Q. Did you state to him in that interview that the time of the accident was about 1.15 a. m.?
A. I think likely; I have no recollection of it at present.
Q. And that the train was 30 minutes late, and was running 35 miles an hour?
A. I might; I don't know that I did, though.
Q. If you stated it, was it true?
A. To the best of my recollection, it was 30 miles an hour.
Q. I am talking about the statement you made at the time; if you made that statement to him was it true?
A. 35?
Q. Yes, sir.
A. I couldn't swear to-day whether it was 30 or 35 or 25.
Q. I am speaking about what you said to him.
A. I can't recollect what I said to him.
Q. Did you also state that "all of the cars caught fire; but the presence of mind of the conductor in throwing on snow saved them from destruction?"
A. No, sir; I didn't state that.
Q. Did you state to him that you never saw cars strung so far apart. * * * The passenger coaches' plunge was a distance of about 40 feet from the track. It struck on its side minus the
144 trucks, and in a demoralized condition. About 80 or 100 feet further down the track, the smoking car lay on its side, also minus its running-gear. Still further down the track, about 80 feet, the baggage car struck on its end and side." Did you make that statement to him?
A. I have no recollection of it.
Q. Was that description true?
A. I don't think it was; Mr. Delevan was down to the wreck himself in the morning; probably got those points himself.
Q. Did you relate to him the "comical incident" that occurred to a young man there on the train, that he burned a certain part of his clothes; did you relate that funny story to him?

Mr. SPRINGER: I don't think that is material.
The COURT: That is not material to this case.

Q. I desire to know whether or not you stated to Mr. Delevan at that time, as one of the comical incidents that occurred, that a young man who was injured in the train, "was thrown across the car and

sat square down on a quantity of live coals from the stove;" did you tell him that?

Objected to as immaterial and not cross-examination. Objection sustained.

Q. Did you have any conversation with any of the passengers in the train relative to the rate of speed before the accident?

Objected to as indefinite and uncertain.

The COURT: I think you may answer the question.

145 A. Before the accident?
Q. Yes, sir.

Objected to as last above.

The COURT: You may ask the question.

Exception by defendant.

A. Well, I have no recollection.
Q. Did you see the witness Cunningham yesterday?
A. No, sir.
Q. You were not in the court-room?
A. No, sir.
Q. Did you see Mr. Cunningham, the witness on the stand yesterday?
A. No, sir; I wasn't here.

Mr. O'BRIEN to the bystanders: Is Mr. Cunningham in court?
Mr. CUNNINGHAM: Yes, sir.
Mr. O'BRIEN to Mr. Cunningham: Will you stand up a moment?

Mr. Cunningham stood up.

Q. To the witness: Do you recognize that gentleman standing up there?
A. No, sir; I do not.
Q. Now, I will ask you whether or not, just before this accident in the same coach you were in when the accident occurred, that man asked you the reason you were running at such a rapid rate of speed; and did you not tell him, in reply to that, that you had to make 45 miles an hour in order to catch up?

146 Objected to as incompetent, immaterial, and not cross-examination. Objection overruled. Exception by defendant.

A. No, sir; I did not.
Q. Or any statement of that kind?
A. Nothing of the kind.
Q. At that time or place—to that passenger, or to any other passenger?
A. No, sir.
Q. You had no conversation with any passenger in relation to the rate of speed?

A. Not to my recollection; I might have had; frequently do on trains, of course; I couldn't say I had no such conversation as that.

Q. Do you know where your brakeman is now?

A. Yes, sir; he is in West Liberty to-day; he is now running baggage on my train.

Q. In the employ of this company?

A. Yes, sir.

Q. What did you say his name was?

A. John Forrest.

Q. Is he a relative of yours?

A. A brother of mine; yes, sir.

Q. What time did you leave Cedar Rapids that night?

A. To the best of my recollection, it was 9.10 or 9.15.

Q. That is how far from Greene?

A. 91 miles.

147 Q. Now, wasn't it 9.59 you left Cedar Rapids that night?

A. No, sir.

Q. Didn't you leave Cedar Rapids late?

A. Yes, sir.

Q. What was your time for leaving—regular time?

A. 8.55.

Q. When do you say you left, about 9.15?

A. Yes, sir.

Q. You are sure it was not 9.59?

A. Yes, sir; I am sure of it.

Q. But the time of the accident is the only exact time you can fix from that point on?

A. That is the only time I wrote down, except at Vinton; I registered there and I wrote the time there.

Q. What was your time there?

A. It was 9.53 or '4.

Q. How far is that from Cedar Rapids?

A. 20 or 21 miles.

Redirect examination by Mr. DAVIS:

Q. In regard to noting the time of the casualty, what, if anything, is the duty of the conductor in regard to taking the time of a casualty of this character?

A. That is his first duty.

Q. And what is the object of that duty?

148 A. It is to know where he is and what he has got to protect against.

By Mr. O'BRIEN:

Q. I understand you, then, that this duty of noting the time is always performed; a man never omits that at all?

A. If he is able to.

Q. He may omit other duties; he may let his passengers burn, but he must never omit the duty of noting the time of an accident?

A. It does not take very much time to note the time.

JOHN KIMBRO, sworn and examined on behalf of the defendant, testified:

Direct examination by Mr. SPRINGER:

Q. Mr. Kimbro, where do you live?
A. Cedar Rapids, Iowa.
Q. What is your business?
A. Locomotive engineer.
Q. Are you in the employment of the defendant at this time?
A. Yes, sir.
Q. How long have you been a locomotive engineer?
A. 12 years.
Q. Where?
A. On the B., C. R. & N.
Q. And where have you run the most of the time?
149 A. The most of the time on the main line.
Q. Between what points?
A. Well, for the last 2 years between West Liberty and Albert Lea.
Q. Were you the engineer in charge of the locomotive engine at the time of the accident?
A. I was.
Q. Will you tell the jury what you first discovered with reference to the accident and what you did?
A. The first indication that I had of anything was a sudden check of speed, and it seemed to me as if somebody had sprung the brake in the car, acted just as if it had been done in that way, and I shut off and looked back through my back window (throwed my head back in that shape); I seen the rear coach going out off the track endwise.
Q. Which coach do you mean?
A. The rear coach; the one next to the sleeper, or the third car from the engine. I applied my brake, but the connections was broken; of course it was of no account. I pulled my engine over and stopped; the engine probably run about the length of itself after I discovered the car going out off the track until it stopped; just as I stopped the baggage car turned over, but did not break the connection from the engine.
Q. Now, you say it acted as if a brake had been set in one of the cars; I will ask you whether the air-brakes can be set from the cars?
A. Yes, sir.
150 Q. Did you look, after the accident, to discover the cause of it; look at the track to discover the cause of the accident?
A. Yes, sir.
Q. What was the cause of the accident?
A. A broken rail.
Q. Now, before the accident occurred what were you doing—just before it occurred; what was your post of duty?
A. Well, nothing more than the ordinary; looking out for the——
Q. Looking out ahead?
A. Yes, sir; that everything was all clear ahead.

Q. Was this rail on your side of the engine?

A. Yes, sir; on my side of the engine.

Q. Now, you say you were looking ahead; did you discover that there was any broken rail on the track?

A. No, sir.

Q. Was there any indication of a broken rail at the time your engine passed over the place where the broken rail was?

A. There was nothing unusual; I felt no jar nor nothing to indicate anything being wrong with the track whatever, when the engine passed over it.

Q. About how far from the broken rail did you stop the engine?

A. Well, I should judge that it was somewhere near 300 feet.

151 Q. After you discovered that there was something wrong, what could you have done to stop your engine that you did not do?

A. Nothing.

Q. Do you know about the degree of curvature and the length of this curve?

A. Well, it was very cold; I should judge it was 10 degrees below zero.

Mr. Davis:

Q. He don't say the temperature; he says the curve.

Witness: Well it was not a sharp——

Q. Was it a sharp curve or the reverse?

A. No, sir; it was a very long, light curve. I am not positive in regard to the degrees of curvature; I don't know as I could say just what curvature it was; but it was very light, very light.

Q. At what speed were you running just before the accident?

A. I wasn't running to exceed 30 miles an hour the whole night.

Q. You may state whether or not you had run the schedule speed up to this time.

A. No, sir; I had not.

Q. Do you remember whether or not you had lost any time between Cedar Rapids and the point of the accident?

A. I had lost somewhere near 30 minutes.

Q. Why?

A. Well, my engine wasn't steaming, and I had a strong

152 head-wind; the weather cold; everything was what we call hard wheeling; snow blowing.

Q. How cold, in your judgment, was the weather at that time?

A. Well, I should judge it was 10 degrees below zero.

Q. And what kind of a country is that there as to the sweep of the wind—any timber or anything to prevent the sweep of the wind?

A. No, sir; it is a very windy, open country, where wind can have a fair sweep.

Q. Now, I will ask you the direct question: Were you trying to make up time at any point between Shell Rock and the place of the accident?

A. No, sir.

Q. Was there any object in doing so?

A. There was not.

Q. Why not?

A. When I left Shell Rock I could only make Greene for the south-bound train by running at [a] moderate rate of speed such as I had been; I saw that I could not make any farther than Greene without orders; I only had 90 to 100 pounds of steam on the engine, and I was taking my time, going at a moderate rate of speed, about from 28 to 30 miles an hour.

Q. Do you remember at what time the train you were to meet at Greene was due there?

A. Yes, sir.

Q. What time was it?

A. 1.33.

Q. Are you sure of that?

153 A. Yes, sir.

Q. Do you remember at what time the accident occurred?

A. It happened at 1.15.

Q. Did you make a record of it?

A. I made a record of it—memorandum of it—and that morning when the regular train arrived our superintendent was there—came there with the wrecking outfit; I then gave it to him personally, and after I had completed my trip, got back to Cedar Rapids, I went in to our claim agent there, where we have to go to make all such reports, and made a report to him.

Q. He is the assistant superintendent?

A. Yes, sir; no; well, he is at the present time, but he was not at that time.

Q. Well, your duty required of you to make a record of the time?

A. Yes, sir.

Q. Do you know whether these passenger coaches were clear off the road-bed at the point where the broken rail was, or whether they followed the road-bed for some distance before they went off of it?

A. Well, they followed the road-bed three rail lengths.

Q. How many feet is that?

A. The rails are thirty feet long; thirty-feet rails.

Q. Now, where was the coach next to the sleeper, with reference to the sleeper, after the accident?

154 A. It was right opposite.

Q. Now, where was the passenger coach or smoker that was ahead of that, with reference to the sleeper?

A. It was about 50 or 60 feet.

Q. Farther north?

A. Yes, sir.

Q. Which one was it that was up against the wire fence?

A. That went through the fence?

Q. Yes, sir.

A. It was the first-class coach; the 3d car; the one next to the sleeper.

Q. Did the sleeper leave the road-bed?

A. One end of it; the rear end of the sleeper staid on the track; the front end—the north end of it—was down the bank.

Q. Did you examine the track to see what the cause of the accident was?

A. Yes, sir.

Q. When?

A. A broken rail.

Q. I say when, with reference to the accident?

A. Oh, immediately afterward.

Q. What was the cause of the accident?

A. A broken rail.

Q. Did you examine the rail to see why it broke?

A. Yes, sir.

Q. Why was it?

155 A. Well, there was an air-cell in the upright part of the rail. That was the cause of it.

Q. How, if at all, could that have been discovered from the outside, or could it be discovered from the outside?

A. It could not be; it was impossible.

Q. Now, you may state whether the track was spread at the place of the accident. How was the west rail, the rail opposite to the broken rail; was that knocked out of place or remained in place?

A. The rail on the opposite side from the broken rail was in its place—perfect.

Q. How about the bed of the broken rail?

A. The bed of the broken rail still remained in its place.

Q. Spiked down?

A. All spiked down, perfect; there was not a spike removed.

Q. Did you look to see what kind of ties were in the track at the place?

A. Yes, sir.

Q. What kind of ties were they?

A. They were all oak ties.

Q. How was the head-light on your locomotive; a good one or otherwise?

A. Yes, sir; in good condition.

Q. Was it burning immediately prior to the accident?

A. Yes, sir.

156 Q. Now, you may state whether or not steel rails or any kind of rails will or will not break in extreme cold weather, no matter how good or sound they may be?

Objected to as improper in form and definite.

The COURT: I think you may ask the question.

A. Well, as far as my experience goes, I don't know; it is the only case that I have ever had in twelve years of experience of railroading of broken rail.

Q. You may state whether this train immediately prior to the accident was run in an unusual manner?

A. It was not.

Cross-examination by Mr. O'BRIEN:

Q. Mr. Kimbro, how late were you when you left Cedar Rapids; how much behind time?

A. About 20 minutes.

Q. How much behind time when you left Shell Rock?

A. 50.

Q. How did you come to lose so much time?

A. I lost it all night; from West Liberty to the wreck.

Q. Did you do your best to prevent it?

A. Sir?

Q. Did you do your best to prevent losing time; were you struggling against the elements as much as you could?

A. Well——

Q. Was you losing time against your will; were you trying to prevent it?

157 A. I was losing time because I couldn't do otherwise.

Q. Were you making every effort to prevent your losing time?

A. Yes, sir.

Q. That is what I mean. What is the grade from this point, from Shell Rock, to the point of the accident?

A. It is up-grade.

Q. All up-grade?

A. Well, not all, but it has generally an up-grade bearing.

Q. How is it at the point of the accident?

A. It was a slight down-grade.

Q. Whether or not, in this struggle to overcome your losing time, when you came to a down-grade you improved it, didn't you?

A. No, sir.

Q. You didn't? Wouldn't it be natural, if you were making every effort to catch up to your time that you would do it?

A. I had no object in trying to make up time at that point.

Q. Well, why did you just testify—I am talking about that time; I am talking of the general movement of your train; what was the matter with your train that night?

A. Nothing, more than I had a fireman with me that had never fired the engine before, and he couldn't keep the engine hot.

158 Q. The machinery was working all right?

A. Yes, sir.

Q. This man was right by you; you instructed him to keep it hot, didn't you?

A. Well, we may give all the instructions that we possibly can——

Q. Well, then, it was simply the ignorance of your fireman—was the only trouble you had?

A. Well, it was not ignorance, but the man had never fired the engine before.

Q. So far as your engine was concerned it was simply the ignorance of the fireman that affected the capacity of the engine's working. Was there anything else? How much was it affected by the condition of the weather?

A. The weather was cold and I had a strong head-wind.

Q. How much did that affect you; how much per mile would that affect the capacity of your engine; how much would that affect your speed?

A. That affects the speed.

Q. Well, how much; in what proportion would that wind, on that night, the condition of the weather that night, affect the capacity of your engine to run; what proportion? Give us your judgment.

A. Well, I don't know; don't know what you have reference to.

Q. Well, I want to know what difference in the speed the condition of the weather would make; I want to know how much
159 you attribute this loss of time to the ignorance of your fireman and how much to the condition of the weather; which was it?

A. I attributed it to both.

Q. Well, what proportion do you attribute to the weather?

A. Well, about as much as I do to the fireman.

Q. Then the weather took about 25 minutes of your time, and the fireman took about the other 25?

A. Yes, sir.

Q. At that rate, going on losing time in that way, you would come into Albert Lea pretty late, wouldn't you?

A. Yes; we came in late that morning.

Q. So, against all your efforts, you were steadily losing all the way through?

A. Yes, sir.

Q. And from the two causes you have stated? You have stated that this is the first accident you ever had with a broken rail.

A. This is the first experience I ever had from a broken rail; yes, sir.

Q. What would be the effect of a high rate of speed going over a broken rail? Do you know whether or not it would be pretty apt to carry the engine over?

A. Well, I couldn't say.

Q. You don't know anything about that?

A. As regards to that, because I don't know.

160 Q. What is the effect of speed on the track in cold weather; whether or not it makes it more dangerous?

A. Well, I don't know as it does.

Q. Will the increase of speed tend to break a rail if the rail is defective?

A. Our company has never made any——

Q. I am not asking you about that; I am asking for your personal judgment. I want to know how much you know about your business. Will the increase of the rate of speed affect the question of the safety of running trains?

A. Not until you get to a reckless rate of speed.

Q. Well, I don't know what you call reckless; is there any lateral pressure on the rails; any outside pressure on the rails, from running a train along?

A. There is, more or less.

Q. Does the pressure increase with speed?

A. Yes, sir.

Q. What is the ratio?

A. I don't know.

Q. What is the difference in pressure in pounds between a train running at 30 miles an hour and one running at 40?

A. I couldn't say.

Q. Is there any difference, to your knowledge?

A. No; I never saw it tested.

Q. Is there any difference, either in the lateral pressure or the horizontal pressure, on the rail in a train running 30 miles
161 an hour and a train running 40 or 45?

A. Well, I should think at a low rate of speed that the pressure would be horizontally greater than at a higher rate of speed.

Q. You think the faster you go with an engine the less pressure there would be on the rail?

A. Well, I should think so.

Q. The effect of your judgment is that it is dangerous to run a train slow?

A. No; I don't know how that is.

Q. Isn't it somewhat necessary that a man running an engine as you are should know something about these things, so as to be able to know how to regulate your speed?

A. Our speed is regulated by our schedule time; we have nothing to do——

Q. Now, then, is there any difference in the danger of running a train when the thermometer indicates 10 degrees below zero, as far as the rail is concerned, and when it is in the summer time?

A. I don't think there is.

Q. You don't think that cold increases the danger at all?

A. No, sir.

Q. Did you ever examine any broken rails before you did this one?

A. This was my first experience in having any accident by a broken rail.

Q. You have examined them before?

A. I have examined broken rails.

162 Q. This theory of air-cells—did you ever hear of it before?

A. Well, I have heard of it, but I have never seen one.

Q. So you wouldn't know this was an air-cell if you hadn't been told of it, never having seen one. If you hadn't been told you would have called it a flaw or a break, wouldn't you?

A. Well, I don't know.

Q. Well, you didn't recognize the air-cell when you saw it; you didn't recognize it by its appearance; you had to be introduced to it; the name had to be given to it before you recognized it as an air-cell? The ordinary man would say a flaw or break in the iron; you couldn't recognize it without an introduction; who introduced you to the air-cell?

Objected to as improper examination.

The COURT: I think it is a little vague.

Q. Who told you about this air-cell; who called this flaw in this iron an air-cell, to your knowledge, first; that's what I want to get at?

A. Well, I did, for one.

Q. You say you never had seen one before?

A. Oh, no; I didn't say that.

Q. Yes, you said not two minutes ago you had never seen an air-cell before. Have you ever seen an air-cell before?

A. Yes, sir.

Q. What is an air-cell?

A. A place containing air.

163 Q. As applied to iron, what is it?

A. The same.

Q. What does it mean as applied to an iron rail?

A. It means directly the *question*.

Q. Have you any other, or better, or different description to give of an air-cell than that?

A. No, sir.

Q. Mr. Kimbro, did you take a lay-off after this accident?

A. No, sir.

Q. You did not; you didn't lay off at all?

A. No, sir.

Q. Did you run your engine regularly every day?

A. Well, I was laid off——

Q. For how long?

A. A week, but——

Q. Any other?

A. Not any.

Q. I don't mean that the company did it; I mean that you quit running your engine for a week.

A. Oh, no.

Q. Weren't you a week that you didn't run your engine?

A. I was laid off a week.

Q. I don't mean as a matter of reproach.

A. Well, I didn't lay off of my own free will.

164 Q. The company laid you off?

A. Yes; but not for anything connected with this.

Q. The fact remains that after this accident you laid off a week?

A. Yes, sir.

Q. Is there such a thing among railroad engineers as an engineer "losing his nerve" after an accident happened, and is unable to run his train for awhile?

A. I couldn't say; I never had any experience of that kind.

Q. You have heard of that; it is a matter known in your business, isn't it?

A. Yes; I have heard of men being prostrated by being nervous.

Q. Now, Mr. Kimbro, another thing: isn't it a matter of fact that in your business each engineer is known as his peculiarities and particular traits are known on the road—the habits of the man and everything of that kind? The general traits of a man—the pecul-

iarities of his habits and his temperament—are known on the road as an engineer; with reference to his employment it is usually known, isn't it?

A. Why, I should judge it was; I don't know.

Q. Aren't you known on the B., C. R. & N. as a fast engineer—what is called a fast runner; isn't that your reputation on your road, and that you are classified and known as a fast runner?

165 A. I don't know, sir, as I am classified as any such.

Q. You don't know. Will you say that it is not a fact that you are known on the road as being an engineer who runs fast; that is, in the classification that occurs in your business you are known as a fast engineer. I don't mean in your personal character fast, but I mean running your engine fast. Isn't that so?

A. I never was accused of it.

Q. You say you haven't that reputation on the road, to your knowledge?

A. I believe my reputation on the road is as good as any other engineer's.

Q. I am not questioning that; I am speaking of your classification. There are men known as fast and men known as slow runners.

A. I have never heard of that.

Q. You have never heard of an engineer who had a capacity for running his engine fast or wild, have you; that is not known in the railroad business?

A. Not to me it ain't.

Q. And you have been a railroad engineer for 12 years. Now, what was the weight of this engine of yours?

A. Well, I don't really know positive, but I think she is between 32 and 33 tons; but she is not over a 33-ton engine.

Q. How long had you been running her at this time?

A. Well, I have not run her any since—not only for a short time since.

166 Q. What are you running now—passenger or freight?

A. Passenger.

Q. How long had you been running this engine at this time?

A. I ran the engine about a year and a half.

A. E. Stirts, sworn and examined on behalf of the defendant, testified:

Direct examination by Mr. Springer:

Q. Mr. Stirts, where do you live?

A. Greene, Iowa.

Q. How long have you lived there?

A. About 12 years.

Q. Are you in the employment of the Burlington road?

A. I am.

Q. The defendant here?

A. Yes, sir.

Q. In what capacity are you working for them?

A. I am the section foreman.

Q. How many years?

A. I have been on that section a little over a year. I commenced a year ago last September on that section.

Q. What experience have you had as a trackman?

167 A. Well, I should judge about 11 years.

Q. Which direction from Greene did your section extend?

A. South.

Q. You remember the time of this accident we have been talking about?

A. Yes, sir.

Q. Did you go to the place of the accident?

A. I did.

Q. What time did you get there?

A. I should judge about 3 o'clock in the morning.

Q. When had you been over that track last before the accident?

A. I was over it the evening before.

Q. How did you go over it?

A. I went over on a hand-car.

Q. What was the condition of the track at the place where the accident took place at the time you went over it?

A. The track was in good condition.

Q. Did you go over the track for the purpose of seeing that it was all right?

A. Yes, sir.

Q. Did you find it all right?

A. The track was all right when I passed over it.

Q. Now, what kind of ties were in the track at the place where the accident took place?

A. They were good oak ties.

168 Q. How many to the mile—or how many to the rail, rather?

A. They run from 14 to 16.

Q. What was the surface of the ties?

A. Well, about 6-inch ties.

Q. Now, what was the character of the road-bed there?

A. The road-bed was the common road, and surfaced with gravel.

Q. Where was the gravel taken from?

A. I think it was taken from Nora Junction, or near there.

Q. Well, you may state whether or not the road at the place of accident, so far as it appeared or could be ascertained, was or was not in a safe condition for the passage of trains over it.

A. The road was in a safe condition; it was the best piece of track I had; smooth and level.

Q. Ballasted, did you say?

A. It is all ballasted with gravel, I think; the whole curve is put up with gravel; the gravel just continues about 1,500 feet beyond where the accident occurred.

Q. Did you look at this broken rail?

A. Yes, sir; I looked at it all as I go along; that is my business—to watch the road.

Q. Well, did you look at the rail after the accident?

A. Why, I did, after I got the track in shape.

169 Q. Well, I mean this broken rail; after you got down there to where the accident was, did you look at it—see what the matter was?

A. I did look at it. I didn't examine it close then. I had to go down the track about a mile to get another rail to put in.

Q. Who was your superior officer, Mr. Stirts?

A. John Lynch.

Q. Who was road-master at that time?

A. Oh, road-master; Mr. Kiley.

Q. Was Mr. Kiley there?

A. He was there.

Cross-examination by Mr. O'BRIEN:

Q. You say this was the best piece of track you had on your section?

A. I did; just as good a piece.

Q. The best ties you had on your section?

A. I have got ties as good there, and the rails were as good.

Q. You said this was the best piece of track you had on your section?

A. I did say it.

Q. How much does your section cover?

A. 6 miles.

Q. This broken rail, when this accident took place, was the best piece of road on the section?

A. It was just as good a piece of track as I had.

170 Q. Don't you think you are going a little too far now in that opinion; do you really mean to be understood that this rail where this break occurred was the best piece of track on your section?

A. I mean the best surface.

Q. What?

A. The surface of it.

Q. Oh, the surface?

A. Yes, sir; that is what I am talking about.

Q. What about the rail; was it a better rail?

A. No, sir.

Q. You think it was the best surface?

A. That is what I mean.

Q. Then everything else except the iron was the best that was on your section?

A. The iron was all alike; it was all the same kind of steel.

Q. Then this rail that was broke was the best rail in your section?

A. I said the track was in the best surface.

Q. Then, as a matter of fact, you say the rest of that track—the ballasting, the ties, etc.—was the best piece of track in the section?

A. It was surfaced up of the best material.

Q. There was less cause for a rail to break on that part than any other part?

No audible answer.

Q. Now, what do you know about steel rails anyway; how long have you been in this business of section foreman?

171 A. I have been foreman nearly 2 years; it will be 2 years in September.

Q. Do you know anything about the manufacture of iron?

A. I never helped manufacture any.

Q. Do you know anything about whether or not it is affected by the weather?

A. I don't know.

Q. Does cold weather affect steel rails?

A. It may affect it some.

Q. Will it be more likely to break in cold weather than in warm weather?

A. I don't know.

Q. Is there any difference in the care you take of it between warm weather and cold weather?

A. You don't take any better care, only watch it.

Q. Do you watch it more closely in cold weather than warm weather?

A. Yes, sir; you have got to go over it every day in the winter time.

Q. But I say do you make a closer watch in cold weather than warm weather?

A. I generally try to.

Q. Well, why?

A. Well, its——

Q. Why?

A. They are more liable to break in the winter time.

Q. It is more liable to break?

A. I should think so.

172 Q. Now, what tests do you apply to the rail in cold weather, except going along in your hand-car? Supposing you are going along down with your hand-car and don't see anything wrong with the ties, the rail, or the road, do you stop?

A. No, sir; not without I have bad rails.

Q. Did you examine this rail closely to see where it was broken?

A. I just walked by that a few days before; I examined all of the rails.

Q. Did you examine this rail after it was broken to see what was the matter with the rail?

A. I did examine it some.

Q. Did you examine it enough to enable you to tell just what was the matter with it?

A. I couldn't tell what was the matter *of* it; I did not have to examine it much.

Q. You didn't try to examine it much?

A. No.

Q. Now, if there is another rail of this kind down in your road there you don't know it, do you?

A. If it was not any worse than that, nobody could detect it.

Q. You didn't learn anything from this broken rail that will help you to find the next one; did you ever have any broken rails in that section before?

A. I had some around the switches.

Q. How many broken rails had you taken out from the time you went to work in September up to the time of this accident?

173 A. 3 or 4 around the yard.

Q. You had 3 or 4 broken rails on that section from September to the time of this accident?

A. Yes; kind of split at the switch, where we throw the rails; have to take them out.

Q. Didn't you have a great many more than 3 or 4?

A. No, I don't think I did.

Q. Didn't you have 35 broken rails that you took out of that section from the time you went there up to that time?

A. Not that I know of.

Q. What?

A. No, sir; I didn't.

Q. But you did have 3 or 4?

A. I did, around switches.

Q. Eh?

A. Yes, sir.

Q. You are still section foreman there, are you?

A. I am.

Q. Track is in good shape now, isn't it?

A. Yes, sir.

Q. Just as good as it was then?

A. The track is in good shape now.

Q. It was just as good then as it *was* now, wasn't it?

Objected to as not proper cross-examination. Objection sustained

By Mr. SPRINGER:

Q. These broken rails you speak of—these 3 or 4 you took

174 out, where were they?

A. They were at the side rails at the switch.

J. E. KILEY, sworn and examined for the defendant, testified:

Direct examination by Mr. SPRINGER:

Q. Mr. Kiley, where do you live?

A. At Nora Springs, Iowa.

Q. What is your business?

A. Road-master——

Q. Of the defendant?

A. The Burlington, Cedar Rapids and Northern.

Q. Are you the general road-master?

A. No, sir; I am road-master of the division.

Q. What territory is comprised in your division?

A. I am road-master of 130 miles of road from Vinton to Albert Lea.

Q. Were you road-master of the same division at the time of this accident?

A. I was, sir.

Q. How long had you been road-master of that division?

A. A little over 2 years at that time.

Q. How long had you been in the service of the defendant at the time of the accident?

A. I have been in the employ of the company a little over 14 years.

Q. How long had you had general charge of the track at the place of the accident?

A. 2 years a little over 2 years.

Q. Where were you employed before that?

A. On the Chicago & Northwestern road.

Q. Well, I mean before the 2 years?

A. As section foreman.

Q. Where?

A. On the same line.

Q. Well, the question I ask you is how long you had had charge, either as section foreman or otherwise, of the track at the place of the accident?

A. Well, I only had charge as road-master two years; as section foreman I didn't have charge of that piece of track.

Q. Where did you?

A. At Rockford and Nora Springs.

Q. Were you at the place of the accident?

A. I was.

Q. Were you on the train when the accident took place?

A. I was.

Q. Did you examine the track at the place of the accident immediately afterwards?

A. I did.

Q. What was the cause of the accident?

A. A broken rail.

Q. What was the matter of the rail, if anything?

A. There was a flaw in the rail.

Q. Describe the flaw to the jury.

A. It extended running through the neck or support of the rail for a distance of four or five feet.

Q. Now, explain to the jury what the neck of the rail is. Is that the thin part?

A. The thin part that supports the ball.

Q. The ball is the part that the cars run on?

A. Yes, sir.

Q. Now, was that flaw well inside of the rail?

A. It was inside, yes, sir.

Q. Could it be discovered from an external examination of it?

A. It could not.

Q. Did you present pieces of that rail to those witnesses who testified in reference to it at Joliet?

A. I did, sir.

Q. You took it down at the time their depositions were taken?

A. I did.

Q. Were those the identical pieces of that rail that contained that air-cell?

A. They were.

Q. Are you positive of it?

A. I am.

Q. Now, what kind of ties were were in this track at the place of the accident?

177 A. They were hard-wood ties.

Q. How were they as to being first-class or otherwise?

A. They were good.

Q. And how was it as to the sufficiency of number in the track?

A. The track was full tied.

Q. What was the character of the road-bed there at the place of the accident?

A. Very good.

Q. Did the track spread at the place of the accident?

A. No, sir; it did not.

Q. Are you sure about that?

A. I am, sir.

Q. Was the base of this broken rail—the flat part that rests on the ties and is spiked to the ties—knocked out of place?

A. No, sir; it was in position.

Q. It remained in place, did it?

A. Yes, sir.

Q. How about the rail on the opposite side?

A. That was in place, full spiked; it showed no indications of being spread whatever.

Q. How was it about the safety and sufficiency of the fastenings at the ends of the rails at this point?

A. The rails were full bolted.

Q. What were the fastenings used?

A. Splices or fish-plates.

178 Q. What was their character as to soundness or goodness?

A. They were all right, sir.

Q. Do you know what the ruling width of the road-bed on this road is?

A. About fourteen or fifteen feet; that is the track-bed.

Q. Now, where did the coach next to the sleeper rest after the accident?

A. About one-half of it rested outside of the right of way; the coach laid at right angles to the track.

Q. And with reference to the sleeper, where did it rest?

A. The sleeper rested nearly opposite the coach.

Q. How far was the sleeper north of the broken rail?

A. About 90 feet.

Q. What was the cause of that accident?

A. A broken rail.

Q. Did you look specially to discover what the cause of the accident was?

A. I did, sir.

Q. Where did the smoker rest with reference to the sleeper?

A. The smoking car, or second-class car, was about 50 or 60 feet beyond the sleeping car, on the opposite side of the track.

Q. How far was the engine beyond the sleeper—north of the sleeper?

179 A. I should judge about 200 feet.

Q. Well, now, was the baggage car detached from the engine?

A. No, sir; not at that time.

Q. Where were you at the time of the accident?

A. I was in the sleeping car—the front end.

Q. Were you asleep?

A. Yes, sir; I was asleep.

Q. You didn't notice about the speed of the train?

A. No, sir; I didn't.

Q. Was there any one to wake you up up to that time?

A. No, sir.

Cross-examination by Mr. O'BRIEN:

Q. Where had you taken the train?

A. At Cedar Rapids.

Q. What was your business up the road?

A. My business was to go home.

Q. Where do you live—Albert Lea?

A. No, sir; at Nora Springs.

Q. You were on your way home?

A. Yes, sir.

Q. Nora Springs is north of this accident?

A. Yes, sir.

Q. And you went into the sleeper and the first thing you knew the accident occurred?

A. Yes, sir.

180 Q. When did you make the examination of this rail?

A. Shortly after the accident.

Q. You mean the next day?

A. Oh, no; within 5 or 10 minutes.

Q. You must have examined it with a lantern, then?

A. Well, I could see it was a broken rail.

Q. Well, I understand; but I mean a critical, careful examination; when was that done?

A. At daylight next morning.

Q. How far from the end was this rail broken?

A. About 5 feet.

Q. How far from the end was this air-cell?

A. This air-cell, so far as I could see, commenced about 5 feet from the end of the rail.

Q. How far from the air-cell was this brake?

A. The brake was right at the air-cell.
Q. And this air-cell was about 5 feet from the end of the rail?
A. Yes, sir.
Q. You have had this rail in your possession ever since—the pieces?
A. Well, not in my possession.
Q. Didn't you take possession of it at that time?
A. I took possession of it at that time.
Q. Keep it after that time?
A. I sent it to Cedar Rapids, headquarters; put a tag on it,
181 and when it was handed over to me the same tag was on it.
Q. How long was it between the time you sent it to headquarters and the time you got it back?
A. Well, I think I sent it in the same day or the next day after the accident—the same day.
Q. How long a piece was it; about 5 feet?
A. I should judge about that.
Q. Did you take it down with you to Joliet?
A. I did.
Q. Went down there yourself?
A. Yes, sir.
Q. And took it back from there?
A. Brought it back from there; yes, sir.
Q. And have had it in your possession ever since?
A. Yes, sir.
Q. Got it in your possession now?
A. Well, not now; no, I have not.
Q. I mean is it in your control?
A. I know where it is; yes.
Q. You haven't given it away?
A. No, sir; I have not.
Q. What weight of rail is this?
A. Intended to be 56-pound rail.
Q. When was it laid down in that road?
A. It was laid—the mark on the rail is 1878, year 1878; I couldn't say when it was laid.
Q. It may have been laid in 1878?
A. Yes, sir.
182 Q. How thick is the neck—what is the diameter?
A. It is between half and three-quarters of an inch.
Q. What is the depth of the air-cell—the diameter of the air-cell?
A. The air-cell runs lengthwise of the neck of the rail.
Q. I know it does, but I want to get at the space of it.
A. Well, it is about two inches, or an inch and a half.
Q. No; I mean across—the diameter—I don't mean the length. Here we have a hollow place in the neck, as I understand you?
A. Yes, sir.
Q. The neck is from half an inch to how much?
A. Three-quarters.
Q. Inside of that is the air-cell?
A. Yes, sir.

Q. Now, I want to know the diameter of that air-cell.

A. Well, that would be [a] pretty hard matter for me to tell; it is so small it would be impossible; it may not be over a hundredth part of an inch.

Q. I couldn't tell: I have never seen this rail.

A. Well, I didn't measure it.

Q. You couldn't tell?

A. No, sir, I couldn't swear.

183 Q. What was its height: how did it extend from the top to the bottom of the rail—how far did it extend?

A. About an inch and one-half or an inch and three-quarters.

Q. The rail is four or five inches high?

A. Four inches high.

Q. Now, starting and taking the bottom of that air-cell, how many inches up did it extend from the bottom of the rail?

A. It started right at the bottom of the rail and reached to the ball, the under part of the ball of the rail.

Q. That would be how many inches?

A. About an inch and a half or an inch and three-quarters.

Q. It went clear through the bottom, did it?

A. It didn't go clear through the bottom; it started at the top of the bottom of the rail.

Q. That would be how far from the outside part of the bottom?

A. Well, the bottom of the rail is three-quarters of an inch, I think.

Q. Then this air-cell started three-quarters of an inch from the bottom of the rail and went up how far?

A. About an inch and three-quarters up.

Q. And it was about 5 inches long, wasn't it?

A. It was about 5 feet in length.

Q. And how wide?

A. About three-quarters of an inch wide.

184 Q. The rail itself was only half an inch?

A. You misunderstand me.

Q. Very likely; but if I do it is unintentional; I am talking of the width of the air-cell; I have got the height and length of it, and I want the width of it; how wide was the air-cell?

A. It may be about a half inch.

Q. That is as wide as the standard?

A. No, sir.

Q. That is half an inch, and the air-cell is half an inch; so there was not any neck?

A. Well, I should judge it was nearly half an inch; I didn't measure it.

Q. Well, then, as a matter of fact, for 5 feet of this rail there was nearly no neck to it, as there was an interregnum between the top and the bottom of the rail of some inch and a half in height by three-quarters of an inch in width?

A. It showed this air-cell all through, five feet.

Q. According to the dimensions you have given, there was

really nothing to support the top of this rail for a distance of 5 feet?

A. Yes, sir, there was; this air-chamber, or air-cell, showed in three different places; the neck of the rail was in three different places, and this cell showed between those three thin layers for 5 feet.

Q. The fact is, then, that this iron was not welded together, isn't it; whether it was air, or wind, or whatever it was, the fact
185 is that the standard of that rail had never been welded or forged together?

A. It looked that way.

Q. That is just the way it was?

A. Yes, sir.

Q. And that rail had been put into the road, you don't know when, and the first time your attention was called to it was when this train was ditched?

A. Yes, sir.

Q. You then found they had laid a rail that had not been welded together?

A. Yes, sir.

Defendant rests.

This closed the testimony in the case, and court thereupon took a recess until 2 o'clock p. m.

Court having convened at 2 o'clock p. m., Mr. Davis addressed the jury on behalf of the defendant.

Mr. O'Brien then summed up to the jury on behalf of the plaintiff. During the course of his argument upon the testimony Mr. O'Brien said:

"I desire to characterize the testimony of these witnesses taken in Joliet as a sham and a fraud, absurd upon its face, false in point of fact, and procured solely for the purpose of producing a false result in this case."

Mr. SPRINGER: That is objected to as unsupported by anything in the case, and I desire to except to the remark of counsel.

186 The COURT: I will not, I think, restrain counsel from making those remarks.

Mr. SPRINGER: My objection is overruled?

The COURT: Yes, sir.

Mr. SPRINGER: I except.

Mr. O'BRIEN: I say in my judgment that that deposition sent down there, and if the answers were not written out before the men signed them, I say in my judgement they were dictated by an attorney for this railroad; who he was I don't know.

Charge to the Jury.

At the conclusion of argument by counsel to the jury the court instructed the jury as follows:

GENTLEMEN OF THE JURY: This action is brought by the plaintiff against the defendant to recover damages for injuries

alleged to have been suffered by the negligence of the defendant. The defendant is, and at the time of the injury was, a railroad company, engaged in carrying passengers for hire. The plaintiff was at the time of the injury a passenger on the train of the defendant upon its road in the State of Iowa. The car was thrown from the track and the plaintiff was injured. The plaintiff claims in this case, or it is claimed on his behalf, that his injury was caused by the negligence of the defendant. This the defendant denies.

The burden is upon the plaintiff in the case to establish the
187 negligence of the defendant by a fair preponderance of the evidence.

The plaintiff's right to recover is based upon the negligence of the defendant which caused the injury, and the question for your determination is, was the defendant negligent or not in the premises. If the defendant was negligent plaintiff can recover; if it was not, it is not liable, notwithstanding the injury.

The defendant was not an insurer of the safety of the plaintiff. It was not absolutely bound to render the transportation of the plaintiff free from any possible peril, but the defendant was bound to carry plaintiff safely so far as the highest vigilance would enable it to do. It was bound to exercise the greatest care and foresight to secure the safety of the passenger, and it must be held liable for the slightest neglect.

Now, the plaintiff claims, as I understand it, that there was negligence in three particulars. He claims that the track was defective, that the rate of speed was unusual and unsafe, and that the condition of the stove in the car where the plaintiff was was unsafe, and that all these conditions contributed to the injury. Its duty as to care existed as to all these instrumentalities, and if it was negligent as to either of them, and such negligence contributed to the injury, it would be liable and the plaintiff could recover.

It appears that immediately after the injury a broken rail was found in the road at the place in question. Now, if this rail was defective, and this defective rail was the cause of the accident—
188 and the defendant, as I understand it, claims that it was—the burden would be upon the defendant to show that it was not negligent in using the rail in its road. The defendant claims it was not negligent in using this rail, and it has introduced testimony as to the nature of the defect and the impossibility of detecting it.

If there was an air-cell in the rail which was broken, and if the air-cell was unknown and not discoverable by the defendant prior to the accident in question by the use of all practicable means known to and employed by those skilled in the operation and management of railways, and said rail was manufactured by a reputable manufacturer who, in the manufacture of the rail, used all the practicable means known to and employed by men skilled in that business to prevent the existence of said air-cell or the detection of the same during the process of manufacture or afterwards, then the defendant is not chargeable with negligence on account of said air-cell in said rail.

If this injury was caused solely by the broken rail, and arose from

a hidden and internal defect in such rail, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the defendant is not liable for the injury, but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense. But if the rail was defective in any respect and the defect might have been discovered and rem-
189 edied by a most careful and thorough examination, then the defendant would be liable for such defect. It is for you to say, gentlemen, in this case what the fact is in that respect from the testimony in the case.

The plaintiff claims also that the train was run at a dangerous rate of speed. It is claimed upon his part that it was run at the rate of 40 or 45 miles an hour. The defendant claims it was running at the rate of 28 to 30 miles an hour, and that that was the usual rate of speed and not a dangerous rate.

A railway company may run its train at any rate of speed it chooses, so that, when taken in connection with the character of the road, its grades, curves, etc., and the various other questions affecting the question of safety, it appears that it does not increase the ordinary risks and dangers incident to travel by rail. So long as the increased speed of trains adds nothing to the dangers and risks of the traveling public, the courts have no right to interpose.

The burden of proof is upon the plaintiff to prove by a preponderance of evidence that the train in question, at the time and place of the accident, was running at an excessive and dangerous rate of speed. And if the testimony of the defendant's witnesses and the facts and circumstances of the case convinces you that this train was run at or less than the usual rate of speed, and that such rate of speed was safe, then there is no question for you to consider in regard to the rate of speed, and in that case defendant is not chargeable with any negligence on account of the rate of speed at
190 which the train was run.

It is for you to say, gentlemen, under the testimony in the case, what the rate of speed was at which the train was running at the time of the accident, and whether there was any negligence in running the train, under the circumstances, at the rate of speed at which it was run—the question of negligence being determined by the testimony and the surrounding circumstances.

Again, the plaintiff claims that the stove in the car was in an unsafe condition, and that there was negligence upon the part of the servants of the company in this respect; that this contributed to the injury. The defendant denies this also. The burden would be upon the plaintiff to establish negligence in this particular. The witnesses upon the part of the plaintiff, some of them—one or more—testified that the stove was red-hot and that the door of the stove was left open. It is claimed upon the part of the plaintiff that this was unsafe; that the employee was careless in this respect, and that when the car was thrown from the track, by reason of the stove being in this condition, the plaintiff was burned in the manner de-

scribed. It is for you to say, also, upon this question, what the fact is in this respect, and whether there was any negligence in the employees of the company regarding the condition of the stove, bearing in mind the rule as I have given it to you upon all these inquiries, that the defendant is bound to exercise the highest degree of care and foresight in all these particulars to secure the safety of its passengers and to prevent injury, and that negligence in
191 any one of these matters makes the defendant liable for any injury that was caused thereby.

The questions of law in this case are very simple; the issues are very simple. The testimony has been comparatively brief and is easily understood; it is not necessary for me to call your attention to it further than I have done.

You will, as I have said, determine the issues in the case upon the testimony in the case. No consideration of sympathy or the fact that the defendant is a railroad company is to influence your verdict. It is to be determined simply upon the facts and testimony in the case. If you find, under these rules, that there was no negligence there can be no recovery in this case and your verdict would be for the defendant; if, upon the other hand, you find that the company failed to exercise the degree of care that I have indicated, and that such failure contributed to the injury of the plaintiff, then it would be your duty to find for the plaintiff.

And in that case it would be necessary for you to consider the injuries which the plaintiff has sustained, their nature, extent, and character. The plaintiff, if entitled to recover at all, is entitled to recover compensation for the injury which he has sustained. Of course, it is impossible in such a case to fix the damages with any mathematical precision, but the nature, degree, extent, and character of the injuries are to be taken into consideration and the amount fixed by the jury in the exercise of sound discretion, the object being to render to the party injured compensation for the injury
192 which he has suffered. The damage would not include any vindictive or punative damages, but only compensatory damages, as I have said, the object being to compensate the plaintiff for the injury which he has suffered and that alone.

You would take into consideration the pain of body that he has suffered and may suffer, the anguish of mind, and the effect upon his ability to earn for himself a livelihood, taking into consideration all the facts, and fix the amount which he would be entitled to recover, if anything, in the exercise of a sound discretion.

If you find for the defendant the form of your verdict would be that you find for the defendant.

If you find for the plaintiff the form of your verdict would be that you find for the plaintiff and assess his damages at the sum—stating it—which you find him entitled to recover.

Mr. O'Brien: Not exceeding the amount claimed in the complaint.

The Court: The amount which the plaintiff claims is fixed in the complaint, and it would not be a larger amount than that in any event.

Counsel for the defendant duly excepted to that portion of the general charge of the court submitting to the jury the question that the track was defective.

193 Also that part of the charge submitting to the jury the issue as to the character and condition of the stove.

Also to that portion of the charge submitting to the jury the question of the anguish of mind to be suffered by the plaintiff in the future.

Defendant's Requests.

The defendant, by its counsel, duly requested the court to instruct the jury as follows:

II.

No issue of negligence is submitted to the jury with respect to the stove in the car in question, and the jury are directed not to consider the question of whether the defendant is chargeable with negligence on account of the kind of stove in said car or its condition as to heat, or as to the door of the same being left open.

Which request was refused by the court, and the defendant duly excepted to such refusal.

III.

No issue of negligence is submitted to the jury with respect to the kind or character of the cross-ties in the track at or near the place of the accident in question, nor whether there was a sufficient number in said track, nor whether the rails in said track were sufficiently spiked to said ties, nor whether said rails were

194 sufficiently fastened at the ends, and the jury are directed not to consider the question of whether the defendant is chargeable with negligence on account of the quality or quantity of ties in said track at or near the place of said accident, nor whether the rails in said track were properly fastened to said ties or at the ends.

Which request was refused by the court, and the defendant duly excepted to such refusal.

IV.

No issue of negligence is submitted to the jury with respect to the character of the rails in the track at or near the place of the accident in question aside from the broken rail in question, and the jury are directed not to consider the question of whether the defendant is chargeable with negligence on account of the character of the rails in said track aside from said broken rail at or near the place of the accident in question.

Which request was refused by the court, and the defendant excepted.

VI.

If the testimony in this case shows that the defendant used due care to discover the defect in the rail in question, and the manufacturer of said rail used due care to prevent the said defect in the pro-

cess of manufacture, or to discover it afterwards, as defined in the defendant's fifth request, the jury are not at liberty to disbe-
195 lieve such testimony because it is opposed to any *prima facie* presumption that the accident in question happened through the negligence of the defendant.

(The fifth request is the one given by the court in the general charge where the words occur: "If there was an air-cell and the air-cell in the broken rail in question was unknown to and not discoverable by the defendant prior to the accident in question," etc.)

Which request was refused by the court, and the defendant duly excepted to such refusal.

VII.

If the jury find for the plaintiff the damages must be strictly limited to compensation; the jury cannot give any vindictive or punitory damages.

Which request was modified by the court in the general charge; to which modification and refusal to charge the defendant duly excepted.

VIII.

If the defendant had used due diligence respecting this rail, as such diligence has been defined in other portions of this charge, and the cause of the breaking the rail was solely by the action of a low degree of temperature, the defendant is entitled to a verdict.

Which request was refused, and the defendant duly excepted to such refusal.

196 IX.

The defendant in the carriage of the plaintiff was not an insurer of his safety, nor was he bound to exercise all the care and diligence the human mind can conceive of; neither was it bound to render the transportation of the plaintiff free from any possible peril.

Which request was not given by the court in the language above requested, and defendant duly excepted to the refusal of the court so to charge.

The jury retired to deliberate upon a verdict, and thereafter and upon the same day returned into court with the following verdict:

Verdict of the Jury.

STATE OF MINNESOTA, *Ramsey County:*

Second Judicial District.

In the case of—

CHARLES L. DUNN, by E. S. Gorman His Guardian *ad litem*,

vs.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY.

We, the jury, find for the plaintiff, and assess his damages at fifty thousand dollars.

CLARENCE E. SECOR.

197 *Notice of Motion for New Trial.*

STATE OF MINNESOTA, } ss:
County of Ramsey, }

District Court, Second Judicial District.

CHARLES L. DUNN, a Minor, by Ellis Stone Gorman, His Guardian *ad litem*, Plaintiff,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Defendant.

To C. D. O'Brien, attorney for above-named plaintiff:

You are hereby notified that the motion for a new trial in the above-entitled cause, which is hereto annexed and herewith served on you, will be brought on for hearing by the defendant before the Honorable H. R. Brill, one of the judges of the above-named court, at his chambers in the Ramsey county court-house, at the city of St. Paul, on the 31st day of January, A. D. 1865, at 10 o'clock a. m., or as soon thereafter as counsel can be heard.

(Signed) J. D. SPRINGER.

Motion for New Trial.

STATE OF MINNESOTA, } ss:
County of Ramsey. }

District Court, Second Judicial District.

198 CHARLES L. DUNN, a Minor, by Ellis Stone Gorman, His Guardian *ad litem*, Plaintiff,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Defendant.

The defendant in the cause above entitled moves the court on the files and records herein, and the settled case, and bill of exceptions to set aside the verdict of the jury herein, and for a new trial, upon the following grounds:

First. The court had no jurisdiction because of the removal of the cause to the United States circuit court for the district of Minnesota prior to the commencement of the trial herein.

Second. The verdict is not sustained by sufficient evidence.

Third. Because of excessive damages appearing to have been given by the jury under the influence of passion and prejudice.

Fourth. Because of errors of law occurring at the trial and excepted to by the defendant.

Fifth. The verdict is contrary to law.

(Signed) J. D. SPRINGER.

199 *Order of the Court.*

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Second Judicial District.

CHARLES L. DUNN, a Minor, by Ellis Stone Gorman, His Guardian *ad litem*, Plaintiff,

vs.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY, Defendants.

The injuries suffered by the plaintiff, for which this action was brought, were severe in the extreme; in no similar case tried in this court, nor in any case reported, so far as I am aware, have the injuries to a person been so great. In addition to the most excruciating pain suffered for many weeks, the plaintiff is forever deprived of the ability to earn a livelihood; he is cut off from the pleasures and ambitions of life, and life itself must become to him a burden. No amount of money can become a compensation for such an injury, but it does not follow that no amount awarded can be too large; the amount should be reasonable; it should be such an amount as will ameliorate the condition of the person injured to the extent that money can have that effect; it should be compensation as far as money can be compensation; beyond that bound a verdict cannot reach, and the injured person is remediless. Plaintiff is undoubtedly entitled to large damages. To determine the amount which should be recovered is a difficult undertaking, and the result
200 cannot be entirely satisfactory, but I am of the opinion that the verdict of $50,000,000 must be held to be excessive. Counsel for plaintiff requested that if this conclusion was arrived at by the court the verdict should be reduced instead of being set aside, and that the reduced verdict should be allowed to stand. I am of the opinion that $25,000 would not be excessive, and that it would be a reasonable allowance. If that amount is accepted in behalf of the plaintiff the verdict will be reduced accordingly and allowed to stand; otherwise a new trial will be granted.

(Signed) HASKELL R. BRILL, *Judge.*

Filed March 5th, A. D. 1885.

Acceptance of Reduced Verdict.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

District Court, Second Judicial District.

CHARLES L. DUNN, a Minor, by Ellis Stone Gorman, His Guardian *ad litem*, Plaintiff,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Defendant.

And now comes the plaintiff herein, by his attorney, in the said action and also by his guardian *ad litem*, and consents that the ver-

dict in the above-entitled action may be reduced to the sum
201 of $25,000, and hereby accepts such reduction and asks that judgment be entered accordingly, to wit, for the sum of $25,000.

(Duly signed.)

Filed March 5th, A. D. 1885.

Notice of Appeal.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

District Court, Second Judicial District.

CHARLES L. DUNN, a Minor, by Ellis Stone Gorman, His Guardian *ad litem*, Plaintiff,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Defendant.

To C. D. O'Brien, attorney for the above-named plaintiff, and to R. W. Bell, clerk of said court:

Please take notice that the above-named defendant does hereby appeal to the supreme court of the State of Minnesota from the judgment of the said district court entered herein and docketed in the office of the clerk of said court on the 5th day of March, A. D. 1885, in favor of said plaintiff and against said defendant, for the sum of $25,000.00.

Dated March 5th, A. D. 1885.

(Signed) J. D. SPRINGER.

202 Admission of service of the foregoing notice at the city of St. Paul, Minn., on the 5th day of March, 1885, duly signed by C. D. O'Brien, attorney for respondent, and R. W. Bell, clerk of said court.

202½ STATE OF MINNESOTA, } ss:
Ramsey County, }

I, R. W. Bell, clerk second judicial district in and for said county and State, do hereby certify and return to the hon. the supreme court of said State that the foregoing are full and true copies of the original affidavit and order of appointment of guardian *ad litem*, consent of E. S. Gorman, complaint, answer, verdict, settled case, notice of motion for a new trial, decision of motion for new trial, consent to reduction by court on motion for new trial, judgment, notice of appeal, bond on appeal in the action therein entitled, and that I have compared the same and they are full and true copies of said originals and of the whole thereof.

Witness my hand and the seal of said district court, at St. Paul, this 19th day of March, A. D. 1885.

[Seal Clerk of District Court, Ramsey Co., Minn.]

R. W. BELL, *Clerk.*

Endorsed: No. 4179. State of Minnesota, supreme Court. Return on appeal. Filed April 10, 1885. Sam. H. Nichols, clerk.

203 *Note of Issue.*

State of Minnesota, Supreme Court.

CHAS. L. DUNN, a Minor, &c., Resp't,

vs.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN R'Y CO.

C. K. Davis & J. D. Spinger, att'ys for appellant; C. D. O'Brien, att'y for respondent.

Please place above cause on next gen'l October term calendar of said court, & oblige—

C. D. O'BRIEN.

To Sam'l H. Nichols, clerk of said court.

(Endorsed:) Filed Sept. 26, 1885. Note of issue. Sam. H. Nichols, clerk.

204 38th day.

State of Minnesota, Supreme Court. General October Term, A. D. 1885.

CHARLES L. DUNN, by Ellis Stone Gorman, His Guardian *ad litem*, Respondent,
vs.
THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Appellant. } No. 81.

MONDAY MORNING, *Nov. 30th. A. D.* 1885—9:30 o'clock.

Court convened pursuant to adjournment, all the justices being present.

This cause came on to be heard this day upon the return to the appeal herein. Thereupon the same was argued by counsel for the respective parties, submitted to the court for decision, and taken under advisement.

A true record.

Attest: SAM. H. NICHOLS, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: SAM. H. NICHOLS, *Clerk.*

Endorsed: No. 4179. Copy of minutes of argument. Filed March 18th, A. D. 1886. Sam. H. Nichols, clerk.

205 *Syllabus.*

Supreme Court. October Term, 1885.

CHARLES L. DUNN, by Ellis Stone Corman, His Guardian *ad litem*, Respondents,

vs.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILROAD COMPANY, Appellant.

It is only where a cause is within the act of Congress that the filing of a petition and bond will remove it from the State to the Federal court. It is the existence of the facts making the cause removable which, upon compliance with the requirements of the statute as to the mode of removal, effects the removal and ousts the State court of jurisdiction. Hence if an action is not, in fact, within the statute, the State court has jurisdiction to try it although a petition and bond for its removal have been filed in due form and not withstanding that there has been no previous order of the Federal court "remanding the cause.

Whether a cause is within the statute and whether the requirements of the statute as to the mode of removal have been com-
206 plied with are both Federal questions, upon which the decision of the Supreme Court of the United States alone is controlling and conclusive; and if a State court decides either question in favor of its own jurisdiction, and its action is affirmed by the highest court of the State, the decision is reviewable on a writ of error by the Supreme Court of the United States.

But before letting go its hold upon a cause the State court has the right, in the first instance, to enquire into the facts upon which its jurisdiction depends. It has the same right to enquire as to the existence of the facts alleged in the petition (such as the citizenship of the parties), in order to determine whether the cause is, in fact, within the statute, as it has to examine the removal papers in order to determine whether the requirements of the statute as to the mode of removal have been complied with.

Held also that evidence as to the condition of the railroad track and of the stove in the car was admissible under the allegations of the complaint; also that the evidence was sufficient to sustain the verdict; also that the amount of damages awarded, as finally fixed by the trial court, cannot, on the facts of this case, be held excessive.

Order affirmed.

207 *Opinion.*

Supreme Court. October Term, 1885.

CHARLES L. DUNN, by Ellis Stone Gorman, His Guardian *ad litem*, Respondents,

vs.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILROAD COMPANY, Appellant.

The defendant, after this cause was at issue, seasonably filed its petition, affidavit, and bond for the removal of the action to the United States circuit court.

The petition alleged that the defendant was a corporation organized under the laws of Iowa, and that plaintiff was, at the time of the commencement of the action, and still was, a citizen of the State of Minnesota.

The plaintiff answered by affidavit, denying that he was a citizen of Minnesota and alleging that he was, at the time his cause of action accrued, and ever since that time had been and still was, a citizen of the Territory of Montana.

The allegation of the petition being thus denied, the court refused "to accept the security offered and transfer the cause until
208 proof was made of the citizenship of the plaintiff." The defendant having offered no such proof, the court, against its objection and exception, proceeded to try the cause, and this is now assigned as error.

The contention of the defendant is that the court had no right to enquire as to whether or not the cause was in fact within the act of Congress; that this was a question exclusively for the Federal court upon a motion to remand; that, by filing a petition and bond in due form the cause was *ipso facto* removed and the State court ousted of jurisdiction, and that it could proceed no further, and that all its subsequent proceedings are void, as being without jurisdiction. Of course no one will deny that if a cause has been removed the State court is ousted of jurisdiction; but it seems to us that defendant's contention proceeds upon the false assumption that the filing of a petition and bond will work the removal of any cause. It is only when the action is within the statute that the filing of the petition and bond will remove it to the Federal court. It is the existence of the facts making the cause removable which, upon compliance with the provisions of the statute, effects the removal. We speak
209 of the Federal court "remanding" a cause; but a motion to remand is equivalent to a special plea to the jurisdiction of the court.

Railway *v.* Swan, 111 U. S., 379.

And an order "remanding" is but in effect a decision sustaining that plea and holding that the Federal court has no jurisdiction, either because the action is not within the statute or because the requirements of the statute as to the mode of removal have not been complied with; and if the Federal court never acquired jurisdic-

tion we fail to see how the State court could ever have lost it. And, so far as we can discover, whenever the Supreme Court of the United States have expressed themselves to the effect that upon filing the proper petition and bond the cause is removed and the State court ousted of jurisdiction the fact that the cause was within the statute either appeared or was assumed. Thus in Kern *v.* Hindekoper, 103 U. S., 485, it is said: "If the cause is removable and the statute for its removal has been complied with, no order of the State court," &c. So in Steamship *v.* Tugman, 106 U. S., 122, it is said: "Upon the filing of the petition and bond—the suit being removable under the statute—the jurisdiction of the State court absolutely ceases."

And in Stone *v.* Sargent, 129 Mass., 503, Gray, C. J.,
210 says: "If the cause is within the act of Congress and the proper petition, affidavit, and surety are filed in the State court, the Federal court takes jurisdiction, although the State court omits or even refuses to make an order of removal." Of course the removability of a cause is a Federal question upon which the decision of the Supreme Court of the United States is and must be controlling and conclusive. Hence if the State court should decide that a cause was not removable and proceed to try it, and the supreme court of the State should affirm, the Supreme Court of the United States would, upon a writ of error, reverse if they should be of opinion that the cause was within the act of Congress; but the same thing is true as to questions touching the sufficiency of the removal papers. These are equally Federal questions upon which the decisions of the State courts are not conclusive. Hence, if a State court should hold the bond or petition insufficient, or that they were not seasonably filed and proceed to try the cause, and if the Supreme Court of the United States, upon the cause being brought up on a writ of error, should be of a contrary opinion, they would reverse the judgment of the State court. Stone *v.* Sar-
211 gent, *supra*.

Yet it seems to be well settled that the State court has a right to examine the petition and bond to see whether the requirements of the statute have been complied with, and need not let go its hold upon the case if this has not been done. Stone *v.* Sargent, *supra*.

Amory *v.* Amory, 95 U. S., 186.

But we can see no distinction in principle between a case where the State court assumes to examine the removal papers to see whether the statute has been complied with and a case where it assumes to enquire whether the cause itself is within the statute. The question in each case is equally a Federal one, upon which the decision of the State court is not conclusive, and in each case alike if the State court decides in favor of its own jurisdiction it does so at the peril of its subsequent proceedings being held void in case the Federal court takes a different view of the question. For this reason and to avoid any appearance of conflict between the two judicial systems, it would usually be expedient for the State court to decline to proceed with a cause until the Federal court has passed

upon the question as to whether it is within the act of Congress. But this would be equally so in cases where there was doubt
212 as to whether the requirements of the statute as to the mode of removal had been complied with.

But there may be cases where, to prevent the practice of imposition upon the court or to defeat a dilatory motion, a State court might deem it advisable to enquire as to the existance of the facts alleged in the petition upon which the right of removal depends. It seems to us it has the right to do this, and if satisfied that the cause is not in fact within the statute, it may proceed to try it at the risk, of course, of its proceedings being held void should the Supreme Court of the United States be of a different opinion, precisely as in a case where the State court assumes to pass upon the sufficiency of the removal papers. Take the present case, for example. As appears from the evidence elicited on the trial, this family had formerly resided in the State of West Virginia. In August, 1883, the father and husband moved out to Glendive, Montana, and entered into the employment of the Northern Pacific Railroad Company at that place, where he has ever since and still resides. At the time of this accident, in Feb'y, 1884, the wife and minor children were on their way from West Virginia to join the husband and father at Glendive, at which place they did join him as soon
213 as this child's injuries permitted them to resume their journey, and at which place they have ever since been and still are domiciled.

On such a state of facts there would be no foundation whatever for the allegation that plaintiff was or is a citizen of Minnesota, and if the showing were the same there could be no doubt that the United States circuit court would, on motion, remand.

And yet if defendant's position be sound it would lead to the illogical result that in the same cause which the Federal court remanded because it had no jurisdiction the judgment of the State court would be void because it had been ousted of jurisdiction.

So far as we have been able to discover, wherever a State court has refused to "allow" a removal and proceeded to the trial of the cause, and it has been afterwards removed to the Supreme Court of the United States, that court has treated and disposed of the case in the same manner, whether it turned upon the sufficiency of the removal papers on their face or the removability of the cause in fact. In the one case their decision is made to depend upon the question whether the State court erred in holding the removal papers insufficient, and in the other case upon the question whether, upon
214 the facts, the State court erred in holding that the cause was not within the act of Congress. Thus, in Railroad v. Koontz, 104 U. S., 5, the petition seems to have been in due form. The plaintiff answered it, denying the allegation that the defendant was a citizen of Maryland. After a hearing upon this question the State court refused the removal and proceeded to try the cause. When the case was afterwards brought up into the Supreme Court of the United States upon a writ of error that court, without intimation or suggestion that the State court had no authority to enquire into the

question of defendant's citizenship, or that its judgment was for that reason void for want of jurisdiction, proceeded to consider whether, upon the facts, the State court erred in holding that defendant was not a citizen of the State of Maryland. And in no instance that we can find has that court held or intimated, where the cause was not within the statute, that the judgment of the State court was void for want of jurisdiction because it had proceeded to try the action before it was formally remanded. If we are correct in the proposition, that it is only where the cause is within the statute that the filing of a petition and bond removes it to the Federal court, it would
215 seem to follow logically and necessarily that the State court is not ousted of jurisdiction of a cause not within the statute, although the removal papers are in due form, any more than it is of a cause within the statute but where the requirements of the law as to the mode of removal have not been complied with. In neither case is the action removed—in the one case because not within the statute, and in the other because the statute has not been complied with.

And in either case we think the State court has the right, in the first instance, to enquire into the facts upon which its jurisdiction depends before letting go its hold upon the case.

We find no decision of the Supreme Court of the United States in conflict with these views. On the contrary, we think we find some support in what is said or implied in Railway Co. *v.* Ramsey, 22 Wallace, 328; Removal Cases, 100 U. S., 457, and Railroad *v.* Koontz, *supra*.

There are one or two circuit court decisions to the contrary, but, as was said by Gray, C. J., in Stone *v.* Sargent, *supra*, no act of Congress and no adjudication of the Supreme Court of the United States has made the opinion of the State court upon the question,
216 whether its own jurisdiction must be surrendered subordinate to the opinion of any Federal tribunal below the Supreme court.

In view of the general tendency of the decisions of the Federal courts under these removal acts, it may be that it will be held that we are in error; but we deem it our duty to assert and maintain what we believe to be the rights of our own courts until it is decided that we are in error by the only tribunal whose authority on the question we are bound to recognize.

In the case at bar the allegation that plaintiff was a citizen of Minnesota had been expressly denied by affidavit, and the defendant, having offered no proof to the contrary (in view of the facts that were developed by the evidence on the trial probably it had none to offer), there was, in our opinion, no error in the court's proceeding with the trial.

II.

During the trial certain exceptions were taken to the rulings of the court in admitting certain evidence and to its instructions to the jury.

All of these that are of sufficient importance to entitle them to any extended consideration can be disposed of together.

217 Defendant's contention is that the plaintiff, having in his complaint assigned specific acts of negligence as the cause of the accident, was limited to these in his proof; that there was no allegation in the complaint that the track was defective, or that the stove in the car in which plaintiff was a passenger was in an unsafe condition, and that, therefore, the court erred in receiving and submitting to the jury evidence on these points, because they were outside of the issues made by the pleadings. The here-important allegations of the complaint are that "by reason of the grossly negligent and wantonly careless acts and conduct of the said defendant, its servants, agents, and employees, who then and there carelessly, recklessly, wantonly, and unnecessarily ran and operated said train at an excessive and dangerous rate of speed, and by reason of the imperfect and unsafe condition of the road-bed, cars, coaches, locomotives, and machinery of said defendant used in operating said railway, and by reason of the incompetency, unskillfulness, and recklessness of its said employees so operating said train of cars, the said train of

218 cars, in the night-time of said 12th of Feb'y, 1884, was thrown from the track and set on fire; that by reason thereof this plaintiff was burned by coals from the stove in said car and otherwise greatly and permanently injured," &c.

These allegations of negligence are somewhat loosely thrown together, and possibly, on motion for that purpose, the plaintiff might have been required to make some of them more definite and certain; but, in the absence of any such motion, we think the evidence objected to was fairly admissible under the allegations of the pleading. The term "road-bed," strictly speaking, of course, refers to the bed upon which the superstructure of the railroad rests, but in this instance we think it apparent that the pleader used it as inclusive of the "track," and under that view evidence as to the condition of the rails and ties was admissible. We think it was also admissible under the allegation that the train was run at an excessive and dangerous rate of speed. That would depend, in part at least, upon the condition and character of the track itself. What would be a safe and proper rate of speed over one track might be a very dangerous and unsafe rate upon a different and inferior track. On the same ground, and independently of any other allega-

219 tion in the pleading, we are strongly inclined to think that evidence was competent that the train was run at this high rate of speed (forty-five to fifty miles an hour, according to several witnesses), with the stove in the car full of burning coals and its door wide open, thus greatly enhancing the danger to passengers in case of any accident such as derailment of a car. But we think that this evidence as to the condition of the stove was clearly admissible under the allegation of the unsafe condition of the cars, it being one of the appurtenances or appliances used in the management and operation of the car itself, and it being this condition of the car (the dangerous condition and character of its heating apparatus) which contributed to the injury of the plaintiff when the car was

derailed. We may also suggest that there is nothing in the entire record indicating or even suggesting that the defendant was at all taken by surprise by the introduction of evidence on these points. On the contrary, the state of the evidence is such as to indicate that all the testimony bearing upon these questions, on either side, was as fully presented as it would have been under other or
220 more specific allegations in the pleadings.

This, of course, would be no reason for an affirmance if the evidence was clearly inadmissible under the complaint and the defendant duly objected and excepted; but we think it is a reason why a court should feel disinclined to adopt a narrow and technical construction of a pleading which would lead to a reversal, if it is fairly susceptible of another and more liberal construction which would support the judgment.

III.

The defendant also contends that the verdict is not supported by the evidence and that the damages were excessive.

We shall not attempt to state even in outline the very voluminous evidence in this case, amounting as it does, to over three hundred and thirty folios. An examination of it satisfies us that the question of the defendant's negligence was clearly a question for the jury, and that the evidence was ample and abundant to support a verdict for plaintiff.

The amount of the verdict as reduced by the court ($25,000) is, of course, large. But if defendant is responsible at all we see no
221 reason, in view of the nature and extent of plaintiff's injuries, for saying that this amount is excessive.

Here is a child eight years old completely crippled and helpless—both eyes burned out, both ears burned off, his hands burned almost to a crisp—in short, the mental and physical functions of his person almost completely destroyed; everything that would make life either enjoyable or useful gone, and nothing left but the capacity to exist—a state in comparison with which death itself would be a blessing. Indeed, his injuries are too terrible for description or contemplation, and are incapable of compensation by any amount of money.

This disposes of all the points made by appellant which we deem necessary to discuss, and the result is that the order denying a new trial must be affirmed.

MITCHELL, J.

222 Endorsed: No. 4179. State of Minnesota supreme court. Charles L. Dunn, by Ellis Stone Gorman, his guardian, respondent, vs. The Burlington, Cedar Rapids and Northern R'y Co., appellant. Opinion & syllabus. Filed March 12th, 1886. Sam. H. Nichols, clerk. Oct. term, 1885. Mitchell, J.

223 *Dissenting Opinion.*

Supreme Court. October Term, 1885.

CHARLES L. DUNN, by Ellis Stone Gorman, his Guardian *ad litem*, Respondents,

vs.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILROAD COMPANY, Appellant.

This action was pending in the district court for Ramsey county.

The defendant, under section 639 Rev. St. U. S. (see Sims *v.* Sims, 17 Blatch., 369) seasonably filed a petition, bond, and affidavit of local prejudice, all in due form (Mlendy *v.* Carrier, 22 Blatch., 503) for the purpose of removing the case to the proper circuit court of the United States. The petition, which was verified, stated that the plaintiff was at the time of the commencement of the action and then a citizen of Minnesota and the defendant a citizen of Iowa. To controvert the statement that he was a citizen of Minnesota (in which State this action was brought) plaintiff introduced an affidavit stating that he was a citizen of the Territory of Montana.

The district judge received the affidavit, holding, upon the
224 authority of Railway Co. *v.* Ramsey, 22 Wallace, 328, that the allegation of diverse citizenship in the petition being thus denied it was for defendant to prove them, and in the absence of such proof he declined to accept the security offered and to allow the case to be removed, but proceeded with the trial.

This is an appeal from the judgment upon a verdict for plaintiff.

Section 639 provides that in order to — a removal the petitioner must, at the time of filing his petition, offer in the State court "good and sufficient surety" for his entering in the circuit court copies of the process, pleadings, &c., in the State court, and that "it shall thereupon be the duty of the State court to accept the surety, and to proceed no further in the case against the petitioner." The effect of this and of similar provisions in other removal acts is that if it appears from the record of which the petition forms a part that the case is one for removal within the provision of the act under which removal is sought, the petitioner is, upon proper procedure (in this case upon filing proper petition, bond, and affidavit of prejudice) entitled to the removal as of course, and the jurisdiction of the State court ceases *eo instanti*.

No contest as to the truth of the facts appearing upon the record and on which the application for removal is based can be
225 had in the State court.

Without entering into any consideration of reasons for or against these propositions, I shall content myself with citing upon this question of precedent the following authorities:

Dillon on Removal of Actions, 3d Ed., §§ 75, 76, 77, 86, 87, and notes.

Butterfield *v.* Home Ins. Co., 14 Minn., 410.

Hatch *v.* Railroad Co., 6 Blatch., 105.

Fisk *v.* U. P. R'y Co., 8 Blatch., 243.

Stevens *v.* Richardson, 20 Blatch., 53.
Shaft *v.* P. M. L. I. Co., 67 N. Y., 544.
Mix *v.* Aniles Ins. Co., 74 N. Y., 53.
Stone *v.* Sargent, 129 Mass., 503.
Danvers' Bank *v.* Thompson, 133 Mass., 182.
Clark *v.* St. P. R. Co., 11 Fed. Rep., 355.
Miller *v.* Tobin, 18 Fed. Rep., 609.
Judge *v.* Anderson, 19 Fed. Rep., 885.
Endy *v.* Conn. F. Ins. Co., 24 Fed. Rep., 65.
Cobb *v.* Globe M. L. I. Co., 3 Hughes, 154.
Dennis *v.* County of Alachua, 3 Woods, 683.
Connor *v.* Scott, 4 Dillon, 242.
Ohh *v.* C. & N. W. R. Co. 64 Iowa, 599.
Ellerman *v.* R. Co., 2 Woods, 120.
Texas *v.* St. Louis R'y Co., 5 McCrary, 348.
Clippinger *v.* Ins. Co., 1 Flippin., 456.
Spear Fed. Judiciary, 472, 516–18.
Taylor *v.* Rockefeller, 18 Am. Law Reg. U. S., 303.
Kanouse *v.* Martin, 15 Howard, 198.
Railway Co. *v.* Ramsey, 22 Wallace, 322.

226 (As to the remark of C. J. Waite in this case with reference to sustaining petition by proof, see Dillon on Removals, 94, 95, notes. 3 So. Law Revised U. S., 236; and *ex parti* Grimball, 61 Ala., 598.)

Ins. Co. *v.* Peckner, 95 U. S., 183.
Gold Washing Co. *v.* Keyes, 96 U. S., 199.
Kern *v.* Hindekoper, 103 U. S., 485.
Railroad Co. *v.* Koontz, 104 U. S., 5.
Steamship Co. *v.* Turpman, 106 U. S., 118.
M. C. & L. M. R'y Co. *v.* Swan, 111 U. S., 379.
Ayers *v.* Watson, 113 U. S., 594.
Street R. Co. *v.* Hart, 114 U. S., 654.

If I do not entirely misap-rehend the tenor of these authorities the trial court should have yielded to the application for removal and proceeded no further in the case. The removal proceedings ousted it of jurisdiction, so that in proceeding with the trial it acted without jurisdiction, and its judgment must therefore be reversed.

As before stated, the removal in this instance was sought to be made under the local prejudice clause of section 639, Rev. Stat. U. S., and the condition of the security offered was in the form by that section prescribed. It is by no means clear, however, that in this state of facts the defendant was not upon the papers also entitled to a removal under the removal act of 1875 within the cases of

227 Norris *v.* Mineral Point Tunnel, 7 Fed. Rep., 272; McNaughton, *v.* L. & Pac. R. Co., 19 Fed. Rep., 881; Melandy *v.* Carrier, 22 Blatchford, 503; and Difford *v.* Nechoff, 13 Fed. Rep., 451; Ayers *v.* Watson, 113 U. S., 594; Steel R. Co. *v.* Hart, 114 U. S., 654.

I think the judgment should be reversed.

BERRY, *J.*

I concur in the foregoing dissenting opinion.

VANDERBURGH, *J.*

228 Endorsed: State of Minnesota supreme court. Charles L. Dunn, by Ellis Stone Gorman, his guardian, &c., respondent, *vs.* The Burlington, Cedar Rapids & Northern R'y Co., appellant. Dissenting opinion. Filed M'ch 12th, 1886. Sam. H. Nichols, clerk. Oct. ter-, 1885. Berry & Vanderburgh, j's.

229 *Appeal from District Court, Second Judicial District, County of Ramsey.*

State of Minnesota, Supreme Court. October Term, A. D. 1885.

CHARLES L. DUNN, by Ellis Stone Gorman, His Guardian *ad litem*, Respondent,
vs.
THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY, Appellant. } No. 81.

This cause having been duly argued at the general October term of this court, A. D. 1885, upon the return to the appeal herein, now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the court below, herein appealed from, be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered March 12th, A. D. 1886.

By the court.

Attest: SAM. H. NICHOL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: SAM. H. NICHOLS, *Clerk.*

230 [Endorsed:] No. 4179. State of Minnesota, supreme court. Charles L. Dunn, by Ellis Stone Gorman, his guardian *ad litem*, respondent, *vs.* The Burlington, Cedar Rapids & Northern R'y Co., appellant. Copy of order for judgment. Filed March 18th, A. D. 1886. Sam. H. Nichols, clerk. Entered on page 174, book E.

231 State of Minnesoto, Supreme Court. October Term, A. D. 1885.

CHARLES L. DUNN, by Ellis Stone Gorman, His Guardian *ad litem*, Respondents,
vs.
THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILROAD COMPANY, Appellants. } No. 81.

Pursuant to an order of court duly made and entered in this cause on the twelfth day of March, A. D. 1886, it is here and hereby determined and adjudged that the order of the court below, herein

appealed from, to wit, of the district court of the second judicial district, sitting within and for the county of Ramsey, be, and the same hereby is, in all things affirmed.

Dated and signed this eighteenth day of March, 1886.

By the court.

Attest: SAM. H. NICHOLS, *Clerk.*

232 STATE OF MINNESOTA, } ss.:
Supreme Court, }

I, Sam. H. Nichols, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court at the capitol, in the city of Saint Paul, this eighteenth day of March, 1886.

[Seal Supreme Court, Minn., attached.]

SAM. H. NICHOLS, *Clerk.*

(Endorsed:) Transcript of judgment filed March 18th, A. D. 1886, Sam. H. Nichols, clerk.

233 [Endorsed:] No. 4179. The foregoing papers attached together and endorsed. Judgment-roll. Filed March 18th, 1886. Sam. H. Nichols, clerk.

234 To the Honorable James Gilfillan, chief justice of the supreme court of the State of Minnesota:

And now comes your petitioner, the Burlington, Cedar Rapids and Northern Railway Company, by J. D. Springer, its attorney, and complains that in the record and proceedings and also in the rendition of a judgment in an action at law between Charles L. Dunn, by Ellis Stone Gorman, his guardian *ad litem*, as plaintiff, and your petitioner as defendant, in the district court of the State of Minnesota in and for the county of Ramsey, in the second judicial district, your petitioner, being entitled under the laws of the United States to a removal of said cause into the circuit court of the United States for the district of Minnesota for trial, filed its petition and bond, also its affidavit of local prejudice, in due conformity with the laws of the United States for a removal of said cause into said circuit court, but such right of removal was denied by the said State court and a trial in said action had, which resulted in a judgment in favor of the said plaintiff and against your petitioner, from which judgment your petitioner appealed to the supreme court of Minnesota, and the said supreme court of Minnesota, being the highest court of law or equity of said State in which a decision could be had in said action, on the — day of March, A. D. 1886, rendered final judgment affirming said judgment appealed from and denied the right of your petitioner to remove said cause for

trial into said circuit court, all of which appears in the record and proceedings in said action, whereby a manifest error hath happened, to the great damage of your petitioner.

Wherefore your petitioner prays for an allowance of a writ of error and such other process as may cause the errors aforesaid to be corrected by the Supreme Court of the United States.

J. D. SPRINGER, *Attorney.*

Allowed.

JAMES GILFILLAN,
Chief Justice of the Supreme Court of the State of Minn.

235 [Endorsed:] Supreme Court of the United States. Chas. L. Dunn *vs.* The B., C. R. and N. R'y Co.

236 Endorsed: Petition for writ of error. Filed March 19th, 1886. Sam. H. Nichols, clerk.

237 STATE OF MINNESOTA, }
County of Hennepin, } *ss:*

A. M. Allen, being first duly sworn, on his oath deposes and says that he served the foregoing writ of error on the defendant in error by delivering to his attorney, C. D. O'Brien, and to Ellis Stone Gorman, his guardian *ad litem* therein named, duly certified copies of said original writ of error, at St. Paul, Minnesota, on the 19th day of March, A. D. 1886.

A. M. ALLEN.

Subscribed and sworn to before me this 19th day of March, A. D. 1886.

[Notarial Seal. Hennepin Co., Minn.]

HOWARD S. ABBOTT,
Notary Public, Hennepin Co., Minn.

238 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because that in the records and process and also in the rendition of judgment of a plea which is in the said court of Minnesota, before you or some of you, being the highest court of the said State in which a decision could be had in the said cause between Charles L. Dunn, by Ellis Stone Gorman, his guardian *ad litem*, as plaintiff, and the Burlington, Cedar Rapids and Northern Railway Company as defendant, wherein was drawn in question the validity of a statute of the United States and authority exercised under a statute of the United States and the right of the defendant to a removal of said cause into the circuit court of the United States for the district of Minnesota, and the decision was against such right and the validity of such statute, and wherein was drawn in question the construction of the removal statutes of the United States and the right of the defendant to remove said cause into said circuit court

for trial, and the decision was against the right specially set up and claimed by the defendant thereunder, a manifest error hath happened, to the great damage of the said Burlington, Cedar Rapids and Northern Railway Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington in said Supreme Court on the first day of the next term thereof, which commences
239 on the second Monday of October, 1886, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 18th day of March, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal U. S. Circuit Court, Dist. of Minnesota.]

OSCAR B. HILLIS,
Clk U. S. Cir. Ct, Dist. of Minn.

Endorsed: Writ of error. Filed Mch 19, A. D. 1886. Sam. H. Nichols, clerk.

240 [Endorsed:] Supreme Court of the United States. Chas. L. Dunn *vs.* The B., C. R. and N. R'y Co. Writ of error.

241 *The Answer of the Judges of the Supreme Court, State of Minnesota, in Within Writ Mentioned.*

STATE OF MINNESOTA, *ss:*

Supreme Court.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America within mentioned, in a certain schedule to this writ annexed and marked "A," as within it is commanded.

Witness the Hon. James Gilfillan, chief justice of the supreme court of the State of Minnesota, at Saint Paul, in the said State of Minnesota, this twenty-seventh day of April, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and ten- year.

[Seal of the Supreme Court, State of Minnesota.]

SAM. H. NICHOLS,
Clerk of the Supreme Court, Minnesota.

Endorsed: The Burlington, Cedar Rapids and Northern Railway Company, p'ff in error, *vs.* Charles L. Dunn, by Ellis Stone Gorman,

his guardian *ad litem*, def't in error. Writ of error. C. K. Davis & J. D. Springer, att'ys, pl'ff in error.

242 Supreme Court of the United States.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

CHARLES L. DUNN, by Ellis Stone Gorman, His Guardian *ad litem*, Defendant in Error.

Know all men by these presents that we, the Burlington, Cedar Rapids and Northern Railway Company, as principal, and Thomas Lowry and J. H. Thompson, of the city of Minneapolis and the State of Minnesota, as sureties, are held and firmly bound unto the above-named defendant in error, his heirs and assigns, executors and administrators, in the sum of fifty thousand dollars ($50,000), to be paid to the said defendant in error, his heirs, assigns, executors, or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with our seals. Dated this 17th day of March, A. D. 1886.

Whereas the above-named Burlington, Cedar Rapids and Northern Railway Company have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the supreme court of the State of Minnesota:

Now, therefore, the condition of this obligation is such that if the above-named Burlington, Cedar Rapids and Northern Railway Company will prosecute its writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY,
By J. D. SPRINGER, *Its Attorney.*

Signed, sealed, and delivered in presence of—
THOMAS LOWRY. [SEAL.]
J. H. THOMPSON. [SEAL.]

243 STATE OF MINNESOTA, } ss:
County of Hennepin, }

Thomas Lowry and J. H. Thompson, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of fifty thousand dollars ($50,000) over and above all his just debts and liabilities.

THOMAS LOWRY.
J. H. THOMPSON.

Sworn to before me this 17th day of March, A. D. 1886.
[SEAL.]
A. M. ALLEN,
Notary Public, Hennepin Co., Minn.

I approve the foregoing bond and sureties.
St. Paul, March 19, 1886.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

Endorsed: Filed M'ch 19, 1886. Bond. Sam. H. Nichols, clerk.

244 [Endorsed:] Copy. Supreme Court of the United States. Chas. L. Dunn *vs.* The B., C. R. and N. R'y Co.

245 STATE OF MINNESOTA, }
County of Hennepin, } *ss:*

A. M. Allen, being first duly sworn, on his oath deposes and says that he served the within citation on the defendant in error therein named by delivering to C. D. O'Brien, attorney for said defendant in error, and to Ellis Stone Gorman, guardian *ad litem* in said citation named, by delivering to them, and each of them, true copies of said citation at the city of St. Paul, Minnesota, on the 19th day of March, 1886.

A. M. ALLEN.

Subscribed and sworn to before me this 19th day of March, A. D. 1886.

[Notarial Seal, Hennepin Co., Minn.]

HOWARD S. ABBOTT,
Notary Public, Hennepin Co., Minn.

246 UNITED STATES OF AMERICA, *ss:*

To Charles L. Dunn, by Ellis Stone Gorman, his guardian *ad litem*, defendant in error, and to C. D. O'Brien, his attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October, 1886, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein the Burlington, Cedar Rapids and Northern Railway Company is plaintiff in error and you, the said Charles L. Dunn, by Ellis Stone Gorman, his guardian *ad litem*, are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in their behalf.

Witness the Honorable James Gilfillan, chief-justice of the supreme court of the State of Minnesota, this 18th day of March, in the year of our Lord one thousand eight hundred and eighty-six.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

Endorsed: Citation. Filed M'ch 19th, 1886. Sam. H. Nichols, clerk.

247 [Endorsed:] Supreme Court of the United States. Chas. L. Dunn *vs.* The B., C. R. and N. R'y Co. Copy.

248 Supreme Court of the United States. October Term, 1886.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY, Plaintiff in Error,

against

CHARLES L. DUNN, by Ellis Stone Gorman, his Guardian *ad litem*, Defendant in Error.

And now comes the Burlington, Cedar Rapids and Northern Railway Company, plaintiff in error, by C. K. Davis, its attorney, and says that in the records and proceedings in the above-entitled cause there is manifest error in this, to wit:

First. The supreme court of Minnesota erred in affirming the judgment appealed from.

Second. The supreme court of Minnesota erred in adjudging that the court rendering the judgment appealed from had jurisdiction to render the same.

Third. The supreme court of Minnesota erred in adjudging that the cause in which said judgment was rendered had not been properly removed into the circuit court of the United States for trial.

Fourth. The supreme court of Minnesota erred in holding that upon the record presented to the court from whose judgment said appeal was taken plaintiff was not entitled to a removal of said cause for trial in the circuit court of the United States for the district of Minnesota.

Fifth. The supreme court of Minnesota erred in adjudging that any issue of fact could be taken upon the petition for a removal in or tried by the State court.

Sixth. The supreme court of Minnesota erred in adjudging
249 that upon the presentation of a petition duly verified with an affidavit of local prejudice and a bond of good and sufficient security to the State court the party presenting the same was not entitled as a matter of right to the removal of such cause into the circuit court of the United States for trial.

And the plaintiff in error aforesaid prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it may have lost by occasion of said judgment.

C. K. DAVIS &
J. D. SPRINGER,
Attorneys for Plaintiff in Error.

Endorsed: Assignment of errors and prayer for reversal. Filed M'ch 19th, 1886. Sam. H. Nichols, clerk.

250 [Endorsed:] Supreme Court of the United States. Chas. L. Dunn *vs.* The B., C. R. & N. R'y Co. Assignment of errors, and prayer for reversal.

251 STATE OF MINNESOTA, *ss.*:

SUPREME COURT.

I, Sam. H. Nichols, clerk of said court, do hereby certify that I have carefully compared the within and foregoing copy with the

original papers, record, and judgment-roll in the within-entitled action, remaining on file and of record in my office, and that the same is a true and authentic transcript thereof and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of our said supreme court at the capitol, in the city of St. Paul, this 27th day of April, A. D. 1886.

[Seal of the Supreme Court, State of Minnesota.]

SAM. H. NICHOLS,
Clerk of the Supreme Court, Minnesota.

(Indorsement on cover:) The Burlington, Cedar, Rapids and Northern Railway Company, p'ff in error, *vs.* Charles L. Dunn, by Ellis Stone Gorman, his guardian *ad litem*, d'ft in error. Minnesota supreme court.

Endorsed on cover: Minnesota supreme court. No. 977. The Burlington, Cedar Rapids and Northern Railway Company, plaintiff in error, *vs.* Charles L. Dunn, by Ellis Stone Gorman, his guardian *ad litem*. Filed September 6, 1886.

121-182

IN THE

Supreme Court of the United States.

October Term, 1886.

THE BURLINGTON, CEDAR RAPIDS, AND NORTHERN RAILWAY CO., PLAINTIFF IN ERROR, *vs.* CHARLES L. DUNN. } No. 977.

BRIEF FOR PLAINTIFF IN ERROR,

ON MOTION TO DISMISS OR AFFIRM.

EPPA HUNTON,
JEFF. CHANDLER,
For Plaintiff in Error.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1886.

Supreme Court of the United States.

OCTOBER TERM, 1886.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RY. CO.	No. 977.
v.	
CHARLES L. DUNN.	

Brief for Plaintiff in Error on Motion to Dismiss or Affirm.

The defendant in error (the plaintiff in the court below) sued the plaintiff in error in the State Court for Ramsey county, in the State of Minnesota, to recover damages inflicted on him by reason of alleged negligence of the said Railway Company on 12th February, 1884.

That on the 30th day of September, 1884, the said defendant, in the State Court, filed a petition for the removal of the cause to the Circuit Court of the United States for the District of Minnesota under section 639 of Revised Statutes. This petition was filed before any term of said Court was held after the commencement of the suit, and was in the following words:

Record p. 4.

Petition to Remove to U. S. Circuit Court.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

District Court, Second Judicial District.

CHAS. L. DUNN, a Minor, by ELLIS STONE GORMAN, his Guardian *ad litem*, Plaintiff,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Defendant.

That the above titled cause is pending for trial and untried in the District Court of Ramsey county, in the State of Minnesota, and that no term of court has been held or commenced since the commencement of this said action.

Second. That the defendant is now, and for more than five years last has been, a corporation for railway purposes duly organized under the laws of the State of Iowa, and during all that time was, and now is, engaged in operating by steam a railroad extending from the city of Burlington, in the State of Iowa, by way of the city of Cedar Rapids, also in the State of Iowa, to the city of Albert Lea, in the State of Minnesota, and in conveying over the same passengers, troops, government supplies, mails, freight, and property on their way from each of said States to the other; that the above action is brought to recover the sum of fifty thousand dollars damages for injuries alleged to have been suffered by Charles L. Dunn, while it is claimed he was being carried by the defendant as a passenger from the city of Cedar Rapids, in the State of Iowa, to said city of Albert Lea, in the State of Minnesota, through the alleged negligence of the defendant; that at the time of the commencement of this action the plaintiff was, and still is, a citizen of the State of Minnesota; that at the time of the commencement of this action the defendant was, and still is, a citizen of the State of Iowa.

Third. That there is a controversy in said action between your petitioner, the above-named defendant, and the plaintiff in said action, and the amount in dispute in

said action exceeds the sum or value of five hundred dollars, exclusive of costs.

Fourth. Your petitioner makes and files herewith an affidavit stating that it has reason to believe, and does believe, that from prejudice and local influence it will not be able to obtain justice in this Court.

Fifth. Your petitioner makes and files herewith a bond of good and sufficient surety for its entering in the Circuit Court of the United States for the district of Minnesota, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said Circuit Court, if said Circuit Court shall hold that the action has been wrongfully or improperly removed thereto.

Your petitioner therefore prays this Honorable Court to accept this petition and said bond, and order the transfer of said action to said Circuit Court of the United States for the district of Minnesota.

J. D. SPRINGER,
Attorney for Petitioner, Minneapolis, Minnesota.

STATE OF IOWA, }
County of Linn, } ss:

C. J. Ives, being first duly sworn, says that he is president of the within-named petitioner, the Burlington, Cedar Rapids & Northern Railway Company, and has read the foregoing petition, and that the statements therein contained are true.

C. J. IVES.

Subscribed in my presence, and sworn to before me by the said C. J. Ives, this 9th day of September, A. D. 1884.

[SEAL.] JOHN C. BROCKSMIST,
Notary Public.

That on the same day the said defendant in the State Court below filed the affidavit of its president in the following words, to wit:

Record p. 5.

STATE OF IOWA, }
County of Linn, } ss:

C. J. Ives being duly sworn says that he resides at the city of Cedar Rapids, in the State of Iowa, and is president of the above-named defendant; that said defendant has reason to believe and does believe that from prejudice and local influence the said defendant will not be able to obtain justice in said State Court in the above-entitled cause.

C. J. IVES.

Subscribed in my presence, and sworn to before me by the said C. J. Ives, this —th day of September, A. D. 1884.

JOHN C. BROCKSMIST,
Notary Public.

Filed September 30, 1884.

R. M. BELL,
Clerk.

The said defendant, on the said 30th September, 1884, in further compliance with said section 639, offered in said State Court good and sufficient surety according to the provisions of said section, as will appear on pages 6 and 7 of the record.

That on the 4th day of October, 1884, one C. D. O'Brien made a counter affidavit as follows:

Record, pp. 7 and 8.

STATE OF MINNESOTA, }
County of Ramsey, } ss:

C. D. O'Brien, being duly sworn, deposes and says that at the time that the cause of action occurred to the plaintiff herein, said plaintiff was a citizen of and domiciled in the Territory of Montana, and that ever since that time said plaintiff has been and now is a citizen and resident of said

Territory and domiciled therein; all of which are well known to said defendant.

C. D. O'BRIEN.

Subscribed and sworn to before me this 4th day of October, A. D. 1884.

[SEAL.] E. S. GORMAN,
Notary Public, Ramsey County, Minn.

Which said counter affidavit was filed in said State Court by the plaintiff in said suit. At the October Term the Railway Company, having complied with the requirements of section 639, asked the Court "to proceed no further in said cause against" the Railway Company.

But the Court, on the 31st of October, 1884, overruled the petition of the Railway Company, and decided to proceed with the trial of the cause. (See pages 14 and 15 of record.)

That on the 12th day of December, 1884, in the State Court, this cause was called for trial, when the Railroad Company called the attention of the Court to a transcript of the case from the Federal Court, to which it had been removed under the statute, showing the removal to the Federal Court, and objected to the assumption of jurisdiction by the State court and to proceeding with the trial of the case. (See Record, page 9.) This objection was disregarded, and the State court proceeded with the trial, which resulted in a verdict for $50,000.

The Railway Company thereupon moved for a new trial on the following grounds, (Record, p. 101:)

First. The Court had no jurisdiction because of the removal of the cause to the United States Circuit Court for the district of Minnesota prior to the commencement of the trial herein.

Second. The verdict is not sustained by sufficient evidence.

Third. Because of excessive damages appearing to have been given by the jury under the influence of passion and prejudice.

Fourth. Because of errors of law occurring at the trial and excepted to by the defendant.

Fifth. The verdict is contrary to law.

(Signed) J. D. SPRINGER.

The Court ruled that $50,000 was excessive damages, and that $25,000 would not be excessive, and if the last-named "amount was accepted by the plaintiff below the verdict will be reduced accordingly and allowed to stand; otherwise a new trial will be granted." The plaintiff accepted the verdict for the smaller sum, and thereupon a judgment was entered for it. (Record, pp. 102 and 103.)

The Railway Company appealed to the Supreme Court of Minnesota, which last-mentioned Court, on the —— day of March, 1886, affirmed the judgment of the lower State Court.

From this last decision the Railway Company appeals to this Court.

And now the defendant in error moves to dismiss the writ of error for want of jurisdiction, because the record does not present a Federal question, or, if not dismissed, that the judgment of the Supreme Court of Minnesota be affirmed on the ground that said writ of error was taken for delay only.

Is a Federal Question Involved?

There can be but one answer.

The petition for writ of error to this Court assigns but one error in the State Court. The refusal of the lower State Court to remove this cause into the United States Circuit Court, and the affirmance of this decision and refusal by the highest State Court of Minnesota.

This is the sole question to be determined here, and surely this must be a Federal question, because it grows out of, and owes its existence to, an act of Congress.

The question involved in this case is, Did the State Court rightly construe this statute? And did said Court, by its refusal to remove this cause, deny to the plaintiff in error a right claimed under statute of the United States?

In this case no objection was made in the Court below to the security offered. The counsel for the defendant in error, in his brief on this motion, says on page 2: "The petition was accompanied by an affidavit required by the statute, and also by a paper styled in the petition for removal a bond, but this paper was not under seal nor was it signed by any person or persons as surety."

The signatures of sureties was omitted by mistake in making up the record. The certificate of the Notary Public on page 7 shows that the sureties, W. H. Truesdale and C. D. Hammond, both executed this obligation. It is submitted that the seals were omitted by like mistake, but if not under seal it is a valid obligation and they are bound as sureties.

Section 639 only requires the petitioner to offer good and sufficient surety, and does not say the surety must be bound by bond.

In removal cases (100 U. S. R., 437 the obligation, as found in Dillon on Removal of Causes, (p. 36,) was precisely like the one given in this case. It was signed by the petitioners, by their counsel, and was not under seal.

As no objection was made to the surety or the form of the obligation it must be taken that it was all right. That refusal of the Court to remove the cause to Federal Court was due solely to the counter affidavit of C. D. O'Brien which raised the question whether the plaintiff was a citizen of another State. The Court, on page 8, said: "With-

out discussing the question at length my conclusion is not to accept the security offered and transfer this cause until proof is made of the citizenship of plaintiff; that allegation of the petition having been put in issue."

So that there was no objection to the security. It was declined only because there was not the proof of citizenship which the Court required.

Field & Miller, in their work on Federal Practice, after setting out the mode of removal of a cause from State to Federal Court by the filing of the requisite petition and offering good security, say, on page 128: "It shall thereupon be the duty of the State Court to accept the surety and to proceed no further in the cause against the petitioner." This duty of the State Court arises upon the filing of petition and offering good security.

Spear, in his Law on the Federal Judiciary, (pages 471–2,) says:

"The theory of this provision is that the jurisdiction of the State court in the case shall terminate at the point at which the process of removing the cause therefrom is completed. Whether the petition *presents* the necessary facts according to the statute, and whether the surety offered is good and sufficient, are matters which, in the first instance, are submitted to the judgment of that court, and if all the requisites of the law have been complied with, then, but not otherwise, the jurisdiction of the court is at an end. The State courts in these circumstances have no discretion in the premises and no legal right to continue the exercise of jurisdiction. Any further proceeding in that court is *ipso facto* void."

Dillon in his work above quoted on page 92, § 75, after quoting the act says: "If the case be within the act of Congress, and the petition is in due form, accompanied with the offer of the required surety or bond, the statute

is that the State Court *must* accept the surety or the petition and bond, and proceed no further in the case. Under such circumstances the State Court has no power to refuse the removal, and can do nothing to affect the right and its rightful jurisdiction ceases *eo instanti*. No order of removal is necessary and every subsequent exercise of jurisdiction by the State Court is erroneous."

Mr. Justice Harlan, in delivering the opinion of the court in Steamship Co. *v.* Tugman, (106 U. S. R., page 122,) says: "Upon filing therefore the petition and bond, the suit being removable under the statute, the jurisdiction of the State Court absolutely ceased, and that of the U. S. Circuit Court immediately attached. The duty of the State Court was to proceed no further in the case. Every order thereafter made in that Court was *coram non judice*, unless its jurisdiction was actually restored."

In the case of Fisk *v.* Union Pacific R.R. Co., (6 Blatch., 380,) Judge Blatchford says: "In regard to all the acts for the removal of causes * * * the same principle applies in this particular, that the right to remove is a right which is conferred upon the party directly by the act of Congress, and depends in no manner upon the volition, action, or non-action of the State Court. If this were not so the statutes would be mere waste-paper. Under these acts, where surety is required to be given, the party is required to offer the State Court good and sufficient surety, and the State Court is required, if the surety is good and sufficient, to accept it, and proceed no further in the suit. The State court cannot defeat the right of removal by refusing to act on the question at all, or by refusing to accept the surety, unless it puts the refusal to allow the case to be removed on the ground that the surety is insufficient."

This same doctrine was laid down in Kanouse *v.* Martin, (13 How., 198.)

In the case of Railway Co. *v.* Ramsey, (22 Wal., 328,) cited by counsel in his brief in support of his motion, (page 10,) the Court does use the language quoted: "If, upon the hearing of the petition, it is sustained by the proof the State Court can proceed no further."

But it will be seen on examination of that case the question discussed here was not involved in that case. The papers had been destroyed, and the parties admitted the case had been removed in pursuance of the statute. The point decided was that while consent could not give jurisdiction, the parties could agree to such facts as would give jurisdiction. The proposition whether a State court could hear evidence on the averments of petition was not involved.

The case of Amory *v.* Amory, (95 U. S. Reports, 186,) cited and relied on by the counsel for the motion, only decides that the petition on its face must state facts showing the right of petitioner to removal. It is not pretended that this applies to case at bar.

The case of Ins. Co. *v.* Perchner in same vol., page 183, and which governs Amory *v.* Amory, decides that the *petition for removal must show* affirmatively the right of petitioner to removal.

In the case of Stone *v.* South Carolina, (117 U. S. R., 432,) the last decision on this subject, and cited by counsel in his brief, (p. 11,) the Court appears to settle this much discussed question:

"A State court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer. (*Yulee* v. *Vose*, 99 U. S., 539, 545; *Removal Cases*, 100 U. S., 457, 474.) It is undoubtedly true, as was said in *Steamship Company* v. *Tugman*, (106 U. S., 118, 122,) that, upon the filing of the petition and

bond, the suit being removable under the statute, the jurisdiction of the State court absolutely ceases, and that of the Circuit Court of the United States immediately attaches; but still, as the right of removal is statutory before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute, as was said in Insurance Company *v.* Pechey, (95 U. S., 183, 185:) 'His petition for removal when filed becomes a part of the record in the cause.'

"It should state facts which, when taken in connection with such as already appear, entitle him to the transfer. If he fails in this he has not in law shown to the Court that it cannot 'proceed further with the suit.' Having once acquired jurisdiction, the Court may proceed until it has been judicially informed that its power over the cause has been suspended. The mere filing of a petition for the removal of a suit which is not removable does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the State Court in the case ends and that of the Circuit Court begins.

"All issues of fact made upon the petition for removal must be tried in the Circuit Court, but the State Court is at liberty to determine for itself whether on the face of the record a removal has been effected. If it decides against the removal, and proceeds with the cause notwithstanding the petition, its ruling on that question will be reviewable here after final judgment, under section 709 of the Revised Statutes. (*Removal Cases*, 100 U. S., 457, 472; *Railroad Company* v. *Mississippi*, 102 U. S., 135, 141; *Kerr* v. *Haidekoper*, 103 U. S., 485; *Railroad Company* v. *Koontz*, 104 U. S., 5, 15; *Chesapeake & Ohio Railroad Co.* v. *White* 111 U. S., 134, 135.) If the State Court proceeds after a petition for removal, it does so at the risk of having its final judgment reversed if the record on its face shows that, when the petition was filed, the Court ought to have given up its jurisdiction."

All the questions discussed here seem to have been settled in Stone *v.* South Carolina. It especially decides that "all issues of fact made upon the petition for removal must be tried in the U. S. Circuit Court, but the State Court is at liberty to determine for itself whether on the face of the record a removal has been effected."

The petition being a part of the record is inspected to see if a removal has been effected. If the facts stated in the petition are disputed and put in issue, that issue must be tried in U. S. Court.

It decides also that if the State Court decides against removal and proceeds with the cause, *notwithstanding the petition*, its ruling on that question will be reviewable in Supreme Court after final judgment.

The State Court not only decided this case wrong, but we have the right to reverse it here.

A Federal question is involved in this case, and the State Court ruled erroneously on that question.

This question seems to be settled wisely. If Congress has undertaken to give parties embraced in this legislation a right to removal of their causes from State to Federal courts, because he believes that from prejudice or local influence they will not be able to obtain justice in the State court, it could not have been intended that these State courts, thus affected by prejudice or local influence, should have been intrusted with the decision of any question involving their jurisdiction. It has been rightly left to the United States Circuit Courts to determine all issues of fact arising as to right of removal.

It is maintained by counsel in his brief in support of his motion that this writ of error was taken for delay only, and the question on which jurisdiction depends is so frivolous as to need no further argument, and the judgment of the State Court should be affirmed.

The affirmance of this judgment would be to validate a judgment which is rendered by a State court having no jurisdiction.

It will not do to say the Circuit Court of the United States will remand this case to the State Court if this judgment is set aside, and refer to the evidence introduced on the trial by only one side. No evidence was introduced on the subject of citizenship of plaintiff, because that matter was not in issue on the trial of the cause in the State Court. If the State Court had decided to go no further upon the filing of petition, &c., as it should have done, and a motion had been made in the Circuit Court to remand the cause, then and there only was the plaintiff in error bound to introduce his proof to sustain his petition. Within all the authorities this cause is *now* pending in the United States Circuit Court of Minnesota. It cannot be removed or taken therefrom except by its own or this Court's action remanding it to the State Court.

In the case of Arrowsmith *v.* Harmoning, decided by this Court at its October Term, 1885, and quoted by counsel for the motion in his brief, the Court denied the motion to dismiss, but affirmed the judgment because the same was *manifestly right*; that the Court was acting within its jurisdiction. In this case it is maintained on the authorities, the State Court was acting without any jurisdiction, and the judgment rendered without jurisdiction was manifestly wrong.

As this case stands here the plaintiff in error was, and is, entitled to a trial in the U. S. Circuit Court, a court supposed to be free from prejudice and local influence. It must be presumed there was prejudice or local influence, which produced a verdict for $50,000, and a judgment for $2,500, either of which sums was grossly excessive if the defendant in error was entitled on the proof to any verdict at all.

It is in proof that this train was run with care by skilful employés; that every part of the train was of the best character; that the track and road-bed were in first-rate order, and that the accident was due to an air-chamber in the rail which no known test or process can detect.

That the stove was open is no proof of negligence, because it is actually necessary for the comfort and health of the passengers in that part of the car that the stove should be opened when to hot for comfort or health; nor does it appear that the burning would have been avoided if the stove had been closed.

It is not deemed proper or relevant to go into the other errors alleged to have been committed by the State courts. This case was carried from the lower court of Minnesota to the Supreme Court of that State on what is called a "settled case," provided for by the laws of the State of Minnesota. (See Statutes of Minnesota, 1878, p. 747, chapter 66, title New Trials.)

This "settled case" in the lower State Court was so prepared under the laws of Minnesota as to take the case to the Supreme Court of the State. The opinion of the Supreme Court is signed by Mitchell, Judge, and is endorsed: "Filed M'ch 12, 1886, Sam. H. Nichols, Clerk, Oct. Term, 1885. Mitchell, J."

It is submitted this record is sufficient with the allowance of the writ of error to this Court by James Gilfillan, Ch.-Justice of the Supreme Court of said State, to bring the whole matter before this Court and to show from the record that this Federal question is involved.

Respectfully submitted.

EPPA HUNTON,
JEFF. CHANDLER,
Att'ys for Pl'ff in Error.

It is in proof that this train was run with care by skilful employés; that every part of the train was of the best character; that the track and road-bed were in first-rate order, and that the accident was due to an air-chamber in the rail which no known test or process can detect.

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This "settled case" in the lower State Court was so prepared under the laws of Minnesota as to take the case to the Supreme Court of the State. The opinion of the Supreme Court is signed by Mitchell, Judge, and is endorsed: "Filed March 12, 1886, Sam. H. Nichols, Clerk, Oct. Term, 1885. Mitchell, J."

It is submitted this record is sufficient with the allowance of the writ of error to this Court by James Gilfillan, Ch.-Justice of the Supreme Court of said State, to bring the whole matter before this Court and to show from the record that this Federal question is involved.

Respectfully submitted.

EPPA HUNTON,
JEFF. CHANDLER,
Att'ys for Pl'ff in Error.

121-182

IN THE

Supreme Court of the United States.

October Term, 1886.

No. 977.

The Burlington, Cedar Rapids, and Northern Railway Company,

Plaintiff in Error.

vs.

Charles L. Dunn.

BRIEF FOR PLAINTIFF IN ERROR.

EPPA HUNTON,
JEFF. CHANDLER,
For Plaintiff in Error.

WASHINGTON:
JUDD & DETWEILER, PRINTERS
1887.

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 977.

THE BURLINGTON, CEDAR RAPIDS, AND NORTHERN RAILWAY COMPANY

vs.

CHARLES L. DUNN.

Brief for Plaintiff in Error.

The defendant in error (the plaintiff in the court below) sued the plaintiff in error in the State court for Ramsey county, in the State of Minnesota, to recover damages inflicted on him by reason of alleged negligence of the said railway company on 12th February, 1884.

That on the 30th day of September, 1884, the said defendant, in the State court, filed a petition for the removal of the cause to the circuit court of the United States for the district of Minnesota under section 639 of Revised Statutes. This petition was filed before any term of said court was held after the commencement of the suit, and was in the following words:

Record, p. 4.

Petition to Remove to U. S. Court.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

District Court, Second Judicial District.

CHAS. L. DUNN, a Minor, by ELLIS STONE GORMAN, his Guardian *ad litem*, Plaintiff,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY Company, Defendant.

That the above-titled cause is pending for trial and untried in the district court of Ramsey county, in the State of Minnesota, and that no term of court has been held or commenced since the commencement of this said action.

Second. That the defendant is now, and for more than five years last has been, a corporation for railway purposes duly organized under the laws of the State of Iowa, and during all that time was, and now is, engaged in operating by steam a railroad extending from the city of Burlington, in the State of Iowa, by way of the city of Cedar Rapids, also in the State of Iowa, to the city of Albert Lea, in the State of Minnesota, and in conveying over the same passengers, troops, Government supplies, mails, freight, and property on their way from each of said States to the other; that the above action is brought to recover the sum of fifty thousand dollars damages for injuries alleged to have been suffered by Charles L. Dunn while, it was claimed he was being carried by the defendant as a passenger from the city city of Cedar Rapids, in the State of Iowa, to said city of Albert Lea, in the State of Minnesota, through the alleged negligence of the defendant; that at the time of the commencement of this action the plaintiff was, and still is, a citizen of the State of Minnesota; that at the time of the commencement of this action the defendant was, and still is, a citizen of the State of Iowa.

Third. That there is a controversy in said action between your petitioner, the above-named defendant, and the plaintiff in said action, and the amount in dispute in said action

exceeds the sum or value of five hundred dollars, exclusive of costs.

Fourth. Your petitioner makes and files herewith an affidavit stating that it has reason to believe, and does believe, that from prejudice and local influence it will not be able to obtain justice in this court.

Fifth. Your petitioner makes and files herewith a bond of good and sufficient surety for its entering in the circuit court of the United States for the district of Minnesota, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said circuit court, if said circuit court shall hold that the action has been wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to accept this petition and said bond, and order the transfer of said action to said circuit court of the United States for the district of Minnesota.

J. D. SPRINGER,
Attorney for Petitioner, Minneapolis, Minnesota.

STATE OF IOWA, }
County of Linn, } *ss:*

C. J. Ives, being first duly sworn, says that he is president of the within-named petitioner, the Burlington, Cedar Rapids & Northern Railway Company, and has read the foregoing petition, and that the statements therein contained are true.

C. J. IVES.

Subscribed in my presence and sworn to before me by the said C. J. Ives this 9th day of September, A. D. 1884.

[SEAL.] JOHN C. BROCKSMIST,
Notary Public.

That on the same day the said defendant in the State court below filed the affidavit of its president in the following words, to wit:

Record, p. 5.

STATE OF IOWA, }
County of Linn, } ss:

C. J. Ives, being duly sworn, says that he resides at the city of Cedar Rapids, in the State of Iowa, and is president of the above-named defendant; that said defendant has reason to believe and does believe that from prejudice and local influence the said defendant will not be able to obtain justice in said State court in the above-entitled cause.

C. J. IVES.

Subscribed in my presence and sworn to before me by the said C. J. Ives this —th day of September, A. D. 1884.

JOHN C. BROCKSMIST,
Notary Public.

Filed September 30, 1884.

R. M. BELL, *Clerk.*

That said defendant, on the said 30th September, 1884, in further compliance with said section 639, offered in said State court good and sufficient surety, according to the provisions of said section, as will appear on pages 6 and 7 of the record.

That on the 4th day of October, 1884, one C. D. O'Brien made a counter affidavit (Record, pp. 7 and 8):

STATE OF MINNESOTA, }
County of Ramsey, } ss:

C. D. O'Brien, being duly sworn, deposes and says that at the time that the cause of action occurred to the plaintiff herein said plaintiff was a citizen of and domiciled in the Territory of Montana, and that ever since that time said plaintiff has been and now is a citizen and resident of said Territory and domiciled therein; all of which are well known to said defendant.

C. D. O'BRIEN.

Subscribed and sworn to before me this 4th day of October, A. D. 1884.

[SEAL.]

E. S. GORMAN,
Notary Public, Ramsey County, Minn.

Which said counter affidavit was filed in said State court by the plaintiff in said suit. At the October term the railway company, having complied with the requirements of section 639, asked the court "to proceed no further in said cause against" the railway company.

But the court, on the 31st of October, 1884, overruled the petition of the railway company, and decided to proceed with the trial of the cause. (See pages 14 and 15 of record.)

That on the 12th day of December, 1884, in the State court, this cause was called for trial, when the railroad company called the attention of the court to a transcript of the case from the Federal court, to which it had been removed under the statute, showing the removal to the Federal court, and objected to the assumption of jurisdiction by the State court and to proceeding with the trial of the case. (See Record, page 9.) This objection was disregarded, and the State court proceeded with the trial, which resulted in a verdict for $50,000.

The railway company thereupon moved for a new trial on the following grounds, (Record, p. 101:)

First. The Court had no jurisdiction because of the removal of the cause to the United States circuit court for the district of Minnesota prior to the commencement of the trial herein.

Second. The verdict is not sustained by sufficient evidence.

Third. Because of excessive damages appearing to have been given by the jury under the influence of passion and prejudice.

Fourth. Because of errors of law occurring at the trial and excepted to by the defendant.

Fifth. The verdict is contrary to law.

(Signed) J. D. SPRINGER.

The court ruled that $50,000 was excessive damages, and that $25,000 would not be excessive, and if the last-named "amount was accepted by the plaintiff below the verdict will be reduced accordingly and allowed to stand; otherwise

a new trial will be granted." The plaintiff accepted the verdict for the smaller sum, and thereupon a judgment was entered for it. (Record, pp. 102 and 103.)

The railway company appealed to the supreme court of Minnesota, which last-mentioned court, on the — day of March, 1886, affirmed the judgment of the lower State court.

From this last decision the railway company appeals to this court.

A motion to dismiss or affirm was made by the defendant in error, and denied.

Afterwards this cause was advanced under the provisions of the 32d rule, and comes up now for final hearing on the writ of error.

The petition for writ of error to this court assigns but one error in the State court. The refusal of the lower State court to remove this cause into the United States circuit court, and the affirmance of this decision and refusal by the highest State court of Minnesota.

The question involved in this case is, did the State court rightly construe this statute? And did said court, by its refusal to remove this cause, deny to the plaintiff in error a right under statute of the United States?

In this case no objection was made in the court below to the security offered. The counsel for the defendant in error, in his brief on this motion, says, on page 2: "The petition was accompanied by an affidavit required by the statute, and also by a paper styled in the petition for removal a bond, but this paper was not under seal, nor was it signed by any person or persons as surety."

The signatures of sureties was omitted by mistake in making up the record. This omission has been corrected by sending an official copy of the bond with the signatures. The certificate of the notary public on page 7 shows that the sureties, W. H. Truesdale and C. D. Hammond, both executed this obligation. It is submitted that the seals were omitted by like mistake, but if not under seal it is a valid obligation, and they are bound as sureties.

Section 639 only requires the petitioner to offer good and sufficient surety, and does not say the surety must be bound by bond.

In removal cases (100 U. S. R., 437) the obligation, as found in Dillon on Removal of Causes (p. 36), was precisely like the one given in this case. It was signed by the petitioners, by their counsel, and was not under seal.

As no objection was made to the surety or the form of the obligation it must be taken that it was all right. That refusal of the court to remove the cause to Federal court was due solely to the counter affidavit of C. D. O'Brien, which raised the question whether the plaintiff was a citizen of another State. The court, on page 8, said: "Without discussing the question at length, my conclusion is not to accept the security offered and transfer this cause until proof is made of the citizenship of plaintiff; that allegation of the petition having been put in issue."

So that there was no objection to the security. It was declined only because there was not the proof of citizenship which the court required.

Field & Miller, in their work on Federal Practice, after setting out the mode of removal of a cause from State to Federal court by the filing of the requisite petition and offering good security, say, on page 128: "It shall thereupon be the duty of the State court to accept the surety and to proceed no further in the cause against the petitioner." This duty of the State court arises upon the filing of petition and offering good security.

Spear, in his Law on the Federal Judiciary (pages 471–2), says:

"The theory of this provision is that the jurisdiction of the State court in the case shall terminate at the point at which the process of removing the cause therefrom is completed. Whether the petition *presents* the necessary facts according to the statute, and whether the surety offered is good and sufficient, are matters which, in the first instance, are

submitted to the judgment of that court, and if all the requisites of the law have been complied with, then, but not otherwise, the jurisdiction of the court is at an end. The State courts in these circumstances have no discretion in the premises and no legal right to continue the exercise of jurisdiction. Any further proceeding in that court is *ipso facto* void."

Dillon, in his work above quoted, on page 92, § 75, after quoting the act, says: "If the case be within the act of Congress, and the petition is in due form, accompanied with the offer of the required surety or bond, the statute is that the State court *must* accept the surety or the petition and bond, and proceed no further in the case. Under such circumstances the State court has no power to refuse the removal, and can do nothing to affect the right, and its rightful jurisdiction ceases *eo instanti*. No order of removal is necessary, and every subsequent exercise of jurisdiction by the State court is erroneous."

Mr. Justice Harlan, in delivering the opinion of the court in Steamship Co. *vs.* Tugman (106 U. S. R., page 122), says: "Upon filing, therefore, the petition and bond, the suit being removable under the statute, the jurisdiction of the State court absolutely ceased, and that of the U. S. circuit court immediately attached. The duty of the State court was to proceed no further in the case. Every order thereafter made in that court was *coram non judice*, unless its jurisdiction was actually restored."

In the case of Fisk *vs.* Union Pacific R. R. Co. (6 Blatch., 380), Judge Blatchford says: "In regard to all the acts for the removal of causes * * * the same principle applies in this particular, that the right to remove is a right which is conferred upon the party directly by the act of Congress, and depends in no manner upon the volition, action, or non-action of the State court. If this were not so the statutes would be mere waste paper. Under these acts, where surety is required to be given, the party is required to offer the

State court good and sufficient surety, and the State court is required, if the surety is good and sufficient, to accept it and proceed no further in the suit. The State court cannot defeat the right of removal by refusing to act on the question at all, or by refusing to accept the surety, unless it puts the refusal to allow the case to be removed on the ground that the surety is insufficient."

This same doctrine was laid down in Kanouse *vs.* Martin (13 How., 198)

In Railroad Co. *vs.* Mississippi, 102 U. S. Reports, Mr. Justice Harlan, for the Court, says, on page 141: "The inferior State court erred, as well in not accepting the petition and bond for the removal of the suit to the circuit court of the United States as in thereafter proceeding to hear the case. It was entirely without jurisdiction to proceed after the *presentation* of the petition and bond for removal."

In the case of Railway Co. *vs.* Ramsay (22 Wal., 328), cited by counsel in his brief in support of his motion (page 10), the Court does use the language quoted: "If, upon the hearing of the petition, it is sustained by the proof the State court can proceed further."

But it will be seen on examination of that case the question discussed here was not involved in that case. The papers had been destroyed, and the parties admitted the case had been removed in pursuance of the statute. The point decided was that while consent could not give jurisdiction, the parties could agree to such facts as would give jurisdiction. The proposition whether a State court could hear evidence on the averments of petition was not involved.

The case of Amory *vs.* Amory (95 U. S. Reports, 186), cited and relied on by the counsel for the defendant in error, only decides that the petition on its face must state facts showing the right of petitioner to removal. It is not pretended that this applies to the case at bar.

The case of Ins. Co. *vs.* Perchner, in same vol., page 183, and which governs Amory *vs.* Amory, decides that the

petition for removal must show affirmatively the right of petitioner to removal.

In the case of Fisk *vs.* The Union Pacific Railroad Company, 8 Blatch., Judge Nelson, in pronouncing the opinion of the Court, on page 247, says:

"The learned counsel for the plaintiff seem to suppose that the solicitor is entitled to notice of the time and place of presenting the petition. But this is an error. The act prescribes no such practice, and it is otherwise under all the previous statutes providing for removals. *No affidavits can be read before the State court in opposition. The application on the petition is ex parte, and depends upon the papers upon which it is founded, and if they are regular and conform to the requirements of the statute the court has no discretion, the act is preremptory.*"

This was the act of July 27th, 1866, and is in all respects similar to § 639, so far as the right to removal depends on the petition and security.

In Stevens *vs.* Richards, 20 Blatch., Judge Blatchford, pronouncing the opinion of the Court, says:

"The State court made an order accepting the petition for removal and the bond filed and ordering the removal of the suit into this court. This order was made without prior notice to the attorney for the plaintiff, and the plaintiff contends that the proceedings for removal were therefore irregular. The act of 1875 does not require any notice. *The filing of the petition and bond makes it the duty of the State court to accept them and to proceed no further in the suit.*"

See also Dillon on Removal of Actions, 3d Ed., §§ 75, 76, 77, 86, 87, and notes.

Spear Fed. Judiciary, 472, 516–18.

Spear, on 473, says:

"The question whether the case has been properly removed as required in the statute, and hence whether the circuit court has jurisdiction is one for that court to determine when the case comes before it.

"If the question of residence was contested it would be proper to retain the case in the circuit court of the United States for trial of that question on the merits on formal issues in the cause."

Judge Blatchford in Galvin *vs.* Boutwell, 9 Blatch., 470.

In the case of Stone *vs.* South Carolina (117 U. S. R., 132), the last decision on this subject, and cited by counsel in his brief (p. 11), the Court appears to settle this much discussed question:

"A State court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer. (*Yulee* vs. *Vose*, 99 U. S., 539, 545; *Removal Cases*, 100 U. S., 457, 474.) It is undoubtedly true, as was said in *Steamship Company* vs. *Tugman* (106 U. S., 118, 122), that, upon the filing of the petition and bond, the suit being removable under the statute, the jurisdiction of the State court absolutely ceases, and that of the circuit court of the United States immediately attaches, but still, as the right of removal is statutory, before a party can avail himself of it he must show upon the record that his is a case which comes within the provision of the statute, as was said in Insurance Company *vs.* Pecher (95 U. S., 183, 185): 'His petition for removal when filed becomes a part of the record in the cause.'

"It should state facts which, when taken in connection with such as already appear, entitle him to the transfer. If he fails in this he has not in law shown to the court that it cannot 'proceed further with the suit.' Having once acquired jurisdiction, the court may proceed until it has been judicially informed that its power over the cause has been suspended. The mere filing of a petition for the removal of a suit which is not removable does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the State court in the case ends and that of the circuit court begins.

"All issues of fact made upon the petition for removal

must be tried in the circuit court, but the State court is at liberty to determine for itself whether on the face of the record a removal has been effected. If it decides against the removal, and proceeds with the cause notwithstanding the petition, its ruling on that question will be reviewable here after final judgment, under section 709 of the Revised Statutes. (*Removal Cases*, 100 U. S., 457, 472; *Railroad Company* vs. *Mississippi*, 102 U. S., 135, 141; *Kerr* vs. *Huidekoper*, 103 U. S., 485; *Railroad Company* vs. *Koontz*, 104 U. S., 5, 15; *Chesapeake & Ohio Railroad Co.* vs. *White*, 111 U. S., 134, 135.) If the State court proceeds after a petition for removal, it does so at the risk of having its final judgment reversed if the record on its face shows that, when the petition was filed, the court ought to have given up its jurisdiction."

All the questions discussed here seem to have been settled in Stone *vs.* South Carolina. It especially decides that "all issues of fact made upon the petition for removal must be tried in the U. S. circuit court, but the State court is at liberty to determine for itself whether on the face of the record a removal has been effected.

The petition, being a part of the record, is inspected to see if a removal has been effected. If the facts stated in the petition are disputed and put in issue that issue must be tried in U. S. courts.

It decides also that if the State court decides against removal and proceeds with the cause, *notwithstanding the petition*, its ruling on that question will be reviewable in Supreme Court after final judgment.

The State court not only decided this case wrong, but we have the right to reverse it here.

This question seems to be settled wisely. If Congress has undertaken to give parties embraced in this legislation a right to removal of their causes from State to Federal courts, because he believes that from prejudice or local influence they will not be able to obtain justice in the State court, it could not have been intended that these State courts, thus affected by prejudice or local influence, should have been

intrusted with the decision of any question involving their jurisdiction. It has been rightly left to the United States circuit courts to determine all issues of fact arising as to right of removal.

The affirmance of this judgment would be to validate a judgment which is rendered by a State court having no jurisdiction.

It will not do to say the circuit court of the United States will remand this case to the State court if this judgment is set aside, and refer to the evidence introduced on the trial by only one side. No evidence was introduced on the subject of citizenship of plaintiff, because that matter was not in issue on the trial of the cause in the State court. If the State court had decided to go no further upon the filing of petition, &c., as it should have done, and a motion had been made in the circuit court to remand the cause, then and there only was the plaintiff in error bound to introduce his proof to sustain his petition. Within all the authorities this cause is *now* pending in the United States circuit court of Minnesota. It cannot be removed or taken therefrom except by its own or this court's action remanding it to the State court.

As this case stands here the plaintiff in error was, and is, entitled to a trial in the United States circuit court, a court supposed to be free from prejudice and local influence. It must be presumed there was prejudice or local influence which produced a verdict for $50,000, and a judgment for $2,500, either of which sums was grossly excessive if the defendant in error was entitled on the proof to any verdict at all.

It is in proof that this train was run with care by skillful employés; that every part of the train was of the best character; that the track and road-bed were in first-rate order, and that the accident was due to an air-chamber in the rail, which no known test or process can detect.

That the stove was open is no proof of negligence, because

it is actually necessary for the comfort and health of the passengers in that part of the car that the stove should be opened when too hot for comfort or health; nor does it appear that the burning would have been avoided if the stove had been closed.

This case was carried from the lower court of Minnesota to the supreme court of that State on what is called a "settled case," provided for by the laws of the State of Minnesota. (See Statutes of Minnesota, 1878, p. 747, chapter 66, title, New Trials.)

This "settled case" in the lower State court was so prepared under the laws of Minnesota as to take the case to the supreme court of the State. The opinion of the supreme court is signed by Mitchell, judge, and is endorsed: "Filed M'ch 12, 1886. Sam. H. Nichols, clerk. Oct. term, 1885. Mitchell, J."

It is submitted this record is sufficient, with the allowance of the writ of error to this court by James Gilfillan, chief justice of the supreme court of said State, to bring the whole matter before this Court and to show from the record that the State courts erred in proceeding with the trial of this cause after filing defendant's petition and bond in the lower State court; that the judgment of the State courts is a nullity, and this cause is now pending in the circuit court of the United States for the district of Minnesota.

Respectfully submitted,

EPPA HUNTON,
JEFF. CHANDLER,
For Plaintiff in Error.

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For Plaintiff in Error.

121-182

In the Supreme Court of the United States.

[OCTOBER TERM, 1886.]

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY, *Plaintiff in Error*,

vs.

CHARLES L. DUNN.

No. 977.

Brief for Defendant in Error, on Motion to Dismiss or Affirm.

ENOCH TOTTEN,
For Defendant in Error.

R. O. POLKINHORN, PRINTER.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 977.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY CO., *Plaintiff in Error,*

vs.

CHARLES L. DUNN, by his guardian *ad litem.*

Motion to Dismiss or Affirm.

And now comes the defendant in error and moves the court to dismiss the writ of error in this cause for want of jurisdiction, because the record therein does not present a federal question, or, if the writ of error shall not be dismissed, that the judgment of the said court be affirmed, on the ground that, although in the opinion of this court the record may show that this court has jurisdiction, it is manifest that said writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

ENOCH TOTTEN,
Counsel for Deft. in Error.

In the Supreme Court of the United States.

[OCTOBER TERM, 1886.]

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY, *Plaintiff in Error*,

vs.

CHARLES L. DUNN.

No. 977.

Brief for Defendant in Error, on Motion to Dismiss or Affirm.

This is a writ of error to the supreme court of the State of Minnesota.

The defendant in error instituted his action in the state court to recover the sum of $50,000.00 damages for injuries inflicted upon him by reason of the negligence and carelessness of the Railway Company on the 12th day of February, 1884. The defendant was a child about eight years old, and was on one of the passenger trains of the Company, accompanied by his mother and other members of his family, on his way to the Territory of Montana, where he resides with his parents.

On the night of February 12, 1884, the train, whilst running at a high rate of speed, ran off the track, and the car in which the child was riding was overturned; a stove in the car containing burning coals was thrown upon the de-

fendant in error, and the door of the stove having been previously opened, and left open by one of the officers of the company, the red hot coals were thrown upon him and he was shockingly burned. His ears were burned off, his eyes burned out, and, generally he was so severely injured that it appears to be miraculous that he survived to bring this suit. The cause was tried before a jury and a verdict was rendered for the plaintiff in that court for the sum of $50,000.00. On a motion to set the verdict aside the court ordered that the amount be reduced to $25,000.00 or a new trial would be granted. Thereupon the sum of $25,000.00 was remitted and judgment was entered against the company for $25,000.00. On appeal to the supreme court of the State this judgment was affirmed, and a writ of error was then sued out, upon which the case is here.

Before the trial came on in the state court of original jurisdiction, the defendant presented its petition for the removal of the cause to the circuit court of the United States for the District of Minnesota. The petition was based on the third paragraph of section 639 of the revised statutes, usually denominated the "local influence" statute. The petition contained averments that the defendant company was a corporation of the State of Iowa; that the plaintiff was at the commencement of the action, and still was, a citizen of Minnesota, and that because of prejudice and local influence justice could not be obtained by the company in the State court. The petition was accompanied by an affidavit as required by the statute, and also by a paper, styled in the petition for removal, a "bond," but this paper was not under seal, nor was it signed by any person or persons as "surety." By recitals in this paper it is declared to be under and for the purposes of section 639 of the revised statutes.

This petition was promptly met and traversed by a sworn statement made by the attorney for the plaintiff and filed

in the cause. This statement contained positive allegations to the effect that at the time of the accident the plaintiff in the case was and ever since had been a "citizen and resident" of the Territory of Montana, and that he was domiciled there, and that these facts were "well known to the defendant" company. No evidence was presented on this issue, by either of the parties, and, upon the record thus made up, the question of the removal of the cause was brought up for hearing. The state court denied the prayer of the petitioner, and proceeded to try the cause, with the result before stated.

There is no bill of exceptions in the record; but the transcript sent up by the clerk contains what appears to be a stenographic report of what took place on the trial denominated a "settled case," together with the pleadings and proceedings which were heard prior to the presentation of the petition for removal. Therefore, the sole question (if any) which is presented to this court by the record is as to the correctness of the decision of the state court in refusing to surrender its jurisdiction of the case upon the record made and presented to it as before stated. The supreme court of the State held that the decision of the trial court was right. The opinion of the court, and the dissenting opinion of two of the judges, will be found in the record. (Record, 106.)

The defendant in error now presents a motion to dismiss the writ of error, united with a motion to affirm, according to the provisions of the fifth paragraph of rule 6, because:

First. The record does not so present any federal question as to enable this Court to review the judgment of the state court;

Second. The statement in the petition for removal that the plaintiff below was a citizen of Minnesota was not true in fact, and the cause was not removable under the statute;

the circuit court of the United States could not have taken jurisdiction thereof, and the jurisdiction of this court, if any, is merely technical, and the writ should therefore be dismissed.

Third. Although the record may show that this court has jurisdiction, it is manifest, the writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

Points and Authorities.

I.

The ruling of the court below is not presented here, unless this court can consider as part of the record the opinion of the supreme court of the state, which is made a part of the transcript. There is no certificate of the chief justice of the state court stating that any of the questions, upon which the jurisdiction of this court depends, were involved and decided; that part of the transcript, called a "settled case" (pp. 9, 10), shows that the counsel for the defendant company, after the court announced its intention to "proceed," asked the court to "note an exception;" but to what, or for what, counsel did not state. This exception was never authenticated by the signature or seal of the judge. (p. 10.) It appears only in this "settled case," which is sent here as a part of the transcript and certified to by the clerk.

The remarks in the opinion of the court in *Gross* vs. *Mortgage Co.* (108 U. S., 484), seems to leave in doubt the question whether the opinion of the state court may be examined in order to see if a proper case is presented here, notwithstanding the opinion of the court in *Murdock* vs. *City of Memphis* (20 Wall., 177). The decision in the

case of *Gross* vs. *Mortgage Co.* seems to rest on the statute of Illinois, which requires the opinion of the supreme court of that State to be "spread at large upon the record of the court;" the opinion also gives prominence to the additional fact that a certificate of the chief justice of the state court was also in the record, showing a federal question. There is no such certificate here in this case, and I have been unable to find any statute of Minnesota requiring or authorizing the opinions of the Supreme court of that State to be made a part of the record of the case.

II.

The allegation that the plaintiff in the state court was a citizen of Minnesota, having been denied upon oath and in writing filed in the cause, the defendant in the state court was bound to make some proof to satisfy the state court that this actually was one of the "cases" mentioned in section 639 of the revised statutes which might be removed.

The position assumed and steadily adhered to by the defendant in error is, that whenever a petition in due form, and containing the necessary averments as to citizenship is presented to the State court, together with an offer of good and sufficient surety and an affidavit stating reason for belief, and belief that, because of the existence of prejudice or local influence, he is unable to obtain justice in such court, the state court is immediately ousted of its jurisdiction, without regard to the truth of the averments as to citizenship.

To state this position a little more fully, it means that whenever a defendant to a cause in a state court asserts in due form that the plaintiff is a citizen of one State, and the defendant a citizen of another, and offers good and sufficient surety with the required affidavit of prejudice or local influence, it is immaterial, so far as the state court is concerned, whether those averments as to citizenship are true or false;

that the *bare assertion* or assumption of the fact is enough; that the effect of the national statute is to deprive the state court of the power of inquiry as to the truth of an allegation of a fact intended to take away its jurisdiction, and that the courts of the United States are the exclusive judges of this question. After a careful examination of the cases, I have been unable to find any case wherein this precise question has been presented and decided, and a careful examination of the language of the statute and the authorities relating thereto, leads me to the conclusion that the position assumed by the plaintiff in error, is wholly untenable.

For the purposes of this case the statute upon which this proceeding was based (sec. 639, R. S.) may be thus stated:

> "Any suit commenced in any state court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed, for trial, into the circuit court * * * *in the cases and in the manner* stated in this section.
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> * * * * * *
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> "*Third.* When a suit is between a citizen of a State in which it is brought and a citizen of another State, it may be removed on the petition of the latter * * * if before or at the time of filing said petition, he makes and files in said state court an affidavit stating that he has reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in such state court.
>
> "In order to such removal, the petitioner *in the cases aforesaid* must, at the time of filing this petition therefor, offer in said state court good and sufficient *surety* for his entering in such circuit court, on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the cause. * * * * * * * It shall thereupon be the duty of the state court to accept the *surety* and to proceed no further in the cause against the petitioner."

It seems plain from this statute that in cases wherein it is conceded that the parties, plaintiff and defendant, actually are citizens of different states as mentioned in the law, the presentation to the court in proper form of the petition, the affidavit of prejudice or local influence, with the required surety, necessarily deprives the state court of jurisdiction, whether the reasons for belief in the existence of such prejudice or influence are well grounded or not, and whether or not the party so believes, or not; the fact that the *party has made and filed such an affidavit* is sufficient. But not so as to the question of citizenship. The jurisdiction of the state court may be taken away because of the actual existence of the facts and conditions called for by the statute, and for no other cause; and the jurisdiction of the circuit court can only exist by the combined operation of the citizenship required by the statute, and the demand for a removal of the case in the manner prescribed by law. It is the actual citizenship of the parties, and not the perfunctory or wilfully false assertion of it, which gives the right of removal, if the right exist only in the particular "cases" mentioned in the statute and in none other, and it exists because the case belongs to that category, and not because *somebody says* it does. Suppose some resident of the District of Columbia, well known to be such, who had received an injury through an accident in Virginia on a train belonging to a railroad company, a citizen of Maryland, should bring an action for damages against the railroad company in a state court of Virginia, in Alexandria, and that proceedings, like those in the present case should be taken by the railroad company to secure a removal of the cause to the circuit court of the United States, and that the plaintiff and his counsel should both stand up in open court and orally, as well as in writing, upon oath, deny the truth of the averments as to the citizenship of the plaintiff. And suppose

further that the presiding judge actually knew, and that every man in the court-room knew positively and beyond any doubt that the plaintiff was not a citizen of Virginia, and never had been; notwithstanding the fact that there was a palpable and glaring attempt to impose a falsehood upon the court, would it be compelled to remove the cause? Or would it be the duty or within the power of the court to immediately institute an inquiry and call for proof as to the truth of the averments of citizenship. There is nothing in the language of the statute to forbid this inquiry, and I am unable to understand why the state court should not examine the question. This inquiry must be somewhere made when raised. The circuit court may, and probably must, examine the question, when an order of removal has been made.

(*Plymouth Mining Co.* vs. *Canal Co.*, 118 U. S., 264.)

But, it is submitted, that if the State court, in such a case, would be bound to shut its eyes to an allegation which it knew to be false, and blindly surrender its jurisdiction, it would amount to a mockery of the administration of justice; such a spectacle could never have been intended by the legislative power. The views of the Supreme Court of Minnesota on this subject are well expressed, and the reasoning in favor of the inquiry in the state court appears to be quite conclusive (see pp. 108-9). In this case it was averred by the railroad company that the plaintiff was and had been a citizen of Minnesota; the plaintiff, in effect, stood up in open court and vehemently asserted that he was not then, and never had been, a citizen of Minnesota; and further, that the defendant corporation well knew this fact. These assertions of the plaintiff below were presented to the state court by a sworn statement in due form, which was filed in the court with the record of the cause. Was the state court bound on such a showing

to surrender its jurisdiction and send the cause to the circuit court in order that that court might determine and declare that the proceedings for removal were a sham and a pretense, and immediately send it back? Had it been the intention of Congress that the petition, bond or security upon their face should determine the question of jurisdiction so far as the state court is concerned, the language of the statute would undoubtedly have been that when a petition alleging such citizenship was filed, accompanied by good and sufficient surety, the cause should be instantly removed to the federal court, there to be determined both upon the question of jurisdiction and the general record in the cause. But that is not the language of the statute. The language is, that when the *citizenship exists*, and the fact of such citizenship so existing is alleged by petition, and the surety is given then and then only, the state court shall proceed no farther, but transfer the cause. That the state court should proceed to judicially examine the question, would seem to be the simplest course and the one attended with the least delay. If error should be committed by the state court it could be corrected here. It is difficult to perceive any reason why this should not have been the intention of the legislature, unless there was a suspicion entertained in the legislative mind touching the trustworthiness of State courts in general; there is nothing in the statute to indicate the existence of such a suspicion.

Section 639 of the Revised Statutes is a consolidation of the twelfth section of the judiciary act of 1789, and the removal acts of 1866 (14 Stat., 306) and 1867 (14 Stat., 558). The difference in the language of the statute, as it now appears, from what it was originally, is neither material nor substantial. This court in one of the early cases, and as long ago as 1842, declared that "under the above section (12), *it must be made to appear to the satisfaction of the*

state court that the defendant is an alien, or a citizen of some other State than that in which the suit is brought, and that the matter in controversy, exclusive of costs, exceeds the sum of $500.00. (*Gordon* vs. *Longest*, 16 Peters, 97; see also *Hatch* vs. *R. R. Co.*, 6 Blatchf., 105.)

In the case of *Railway Co.* vs. *Ramsey*, (22 Wall., 328), which arose on the act of 1867, this court said:

> "To obtain the transfer of a suit, the party desiring it must file in the state court a petition therefor, and tender the required security. Such a petition must state facts sufficient to entitle him to have the transfer made. This cannot be done without showing that the circuit court would have jurisdiction of the suit when transferred. The one necessarily includes the other. *If upon the hearing of the petition it is sustained by the proof, the State court can proceed no further.*"

These expressions seem to indicate that where there was a dispute, or an issue raised as to whether or not the "case" was such an one as is removable from a state to the federal court, proofs might be taken and a judicial determination had in the state court.

It will not be denied that when a petition with the other necessary papers are presented to the state court it has *some* judicial duty to perform; it must act upon the case to *some* extent and in *some* way. It certainly may determine whether the petition for removal has or has not been filed too late (*Babbitt* vs. *Clarke*, 103 U. S., 606). It may examine the surety and pass upon his sufficiency (*Fish* vs. *R. R. Co.*, 6 Blatchf., 362, 392). And if it holds that the surety is good its action is final (*Cook* vs. *Seligman*, 17 Blatchf., 459). It may pass judgment on the sufficiency of the petition (*Ex parte Wells*, 3 Woods, 128). In the case last cited the court said, (BRADLEY, J.):

> "The state court is surely not bound to shut its eyes and yield to every application that comes to it. Though removal (when authorized) is a matter of right, and not of favor, yet the court must have the right to see whether the application to remove comes within the meaning of the law."

In *Amory* vs. *Amory* (95 U. S., 186) the state court refused to surrender its jurisdiction. On error to this court, it was said:

> "Holding, as we do, that a state court is not bound to surrender its jurisdiction upon a petition for removal, until at least a petition is filed, which, upon its face shows the right of the petition to the transfer, it was not error for the court to retain these causes. We would not, therefore, consider whether the Act of 1867 limits the right of removal to the citizenship of the parties at the time of the commencement of the suit, or whether the state court had the right to call upon the defendants in error, to show cause against the application."

See, also, *Ins.* vs. *Pechner* (95 U. S., 186), where this court seems to recognize the authority of the state court to "inquire further," that is, beyond the petition for removal.

Very recently it has been held by this court that a state court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer. The right of removal is statutory, and before a party can avail himself of it he must show upon the record that his is a case which comes within the provisions of the statute. The mere filing of a petition for the removal of a suit, *which is not removable*, does not work a transfer. To accomplish this the suit *must be one that may be removed*, and the petition must show a right in the petitioner to demand the removal. *Stone* vs. *South Carolina*, 117 U. S., 432.

In the case of *Koontz* vs. *Railroad* (104 U. S., 5), which was before this court on writ of error to the highest court of the State of Virginia, a petition for removal, in due form, was seasonably presented to the state court by the railroad company; the petition contained the averment that the defendant company was a citizen of Maryland, and that the several plaintiffs were citizens of Virginia. The plaintiffs answered the petition, denying that the company was a citizen of Maryland. The state court regularly heard the issue thus raised, and adjudged it against the defendant company. Afterwards the case was tried, and resulted in a judgment against the company; and the judgment on appeal was affirmed. This court, on the hearing upon the writ of error, proceeded to review the judgment of the state court, for the purpose, apparently, of determining as to the correctness or incorrectness of its decision, but without any intimation that by the mere presentation of the petition for removal showing upon its face such a case as was removable, the state court was ousted of its jurisdiction, and left without any authority to inquire or power to act in any other way than to transfer the case to the circuit court. The right of the state court to inquire appears to have been directly recognized in that case.

It seems plain, both from the language of the statute and upon authority, that the state court possessed the power to make the inquiry into the truth of the averments in the removal petition, touching the citizenship of the defendant in error.

III.

There was no "surety" whatever, either "good and sufficient" or otherwise, offered by the defendant below, in the state court, and that court expressly declined to accept the security offered.

There was no "surety" offered in the state court at the time of the filing of the petition for removal as is required by the statute, and the trial court expressly refused "*to accept the security offered.*" (p. 8.)

It seems to be settled that the state court is to determine whether or not the "surety" offered with the petition is "good and sufficient." (*Fisk* vs. *R. R. Co.*, 6 Blatchf., 362; *Cook* vs. *Seligman*, 17 Blachf., 459.) A "surety" is a person who binds himself for the payment of a sum of money or for the performance of something else for another, who is already bound for the same. (BOUVIER.) The paper presented with the petition for removal to answer the demand of the statute for "good and sufficient surety," is not a *bond*; it is not under seal, and would not be good under the removal act of 1875, which requires a *bond*; the name of the railroad company was signed by its attorney, but no "surety" appears to have signed the paper. No notice of this objection to the proceedings for removal was taken by the supreme court of Minnesota in its opinion, but I have before me the brief of counsel for the appellee in that court, where the point is distinctly made. The state court had no authority to surrender the cause without "good and sufficient surety."

Here was a cause which, as it appeared upon the face of the record in the state court, and as it now appears, was clearly not removable. The allegation that the defendant in error was a citizen of Minnesota was distinctly denied by a sworn traverse, filed in the cause; proof was required to establish the allegation as to citizenship, and to overcome this denial; none was given or offered, hence as the pleadings and record stand the fact must be held to be with the defendant in error, under the statute. The evidence taken down at the trial and sent here by the plaintiff in error,

abundantly establishes the fact that the defendant in error never was a citizen of Minnesota. (See opinion of state court 110.) His father removed from Keyser, in West Virginia, in July 1883, and went to Glendive, in the Territory of Montana, where he has ever since resided. (See 35, 32, 21.) This testimony certainly establishes the falsity of the allegation that the defendant in error was a citizen of Minnesota, and therefore leaves the claim of jurisdiction for the federal court to defend on a frivolous pretense.

If this judgment should be reversed and the cause be remanded, with directions to the state court to remove the cause to the federal court, the fact that the removal proceedings were a sham would inevitably be established there, and the circuit court would necessarily be bound to immediately remand it to the state court. There the cause would again be tried, with probably the same result; unless, indeed, this blind and mutilated child should die in the meantime, of which there is doubtless imminent danger.

Because of the filing of the petition, &c., by the defendant company in the state court, this court (if the record presents the question) probably has jurisdiction, but it is merely technical. The evidence in the record, if the court may look into it, will satisfy the court that the cause was not removable under the statute, and that the decision of the state court in refusing to surrender its jurisdiction was manifestly right. Therefore even if the court should be of opinion that it has jurisdiction, the motion to affirm should be allowed.

In a very recent case in disposing of the same kind of a motion, this court said:

> "The decision, however, necessarily involved the denial of the right claimed in this way, and thus we probably have technical jurisdiction. For this reason the motion to dismiss must be denied, but the ques-

tion on which our jurisdiction depends was so manifestly decided right, that the case ought not to be held for further argument." (*Arrowsmith* vs. *Harmoning*, 118 U. S., 194.)

It is therefore submitted that the writ of error ought to be dismissed for want of jurisdiction, or if there be jurisdiction, that the judgment of the supreme court of Minnesota should be affirmed.

ENOCH TOTTEN,
For Defendant in Error.

C. D. O'BRIEN,
Of Counsel.

121-78

MAR 29 1887
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

CHARLES S. DUNN, a Minor,
By E. S. GORMAN, his Guardian *ad litem*,
Defendant in Error.

Motion to Advance under the 3rd Sub-division of Rule 32.

And Brief for Defendant in Error upon the motion.

C. D. O'BRIEN,
Attorney for Defendant in Error.

RICH & CLYMER, PRINTERS, ST. PAUL.

SUPREME COURT

OF THE

UNITED STATES.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY,

Plaintiff in Error.

vs.

CHARLES S. DUNN, a Minor, by E. S. GOEMAN, his Guardian *ad litem*,

Defendant in Error.

MOTION TO ADVANCE.

Comes now the said defendant in error and moves the Court to advance the above entitled cause to be heard at an early day.

C. D. O'BRIEN,
Attorney for Defendant in Error.

Enoch Totten
of Counsel.

The following reasons are assigned why said cause should be advance, to-wit :

I.

The only question involved is the question of the jurisdiction of the Circuit Court of the United States for the district of Minnesota. The action was commenced by defendant in error in a State court in one of the districts of Minnesota. After issue joined, a petition was filed for its removal under the local prejudice act, and based on the citizenship of the parties. The State court refused to grant the petition for removal, and the cause was tried therein and a verdict rendered in favor of the defendant in error. The cause was then removed to the Supreme Court of the State of Minnesota, and again determined upon the merits, including the jurisdictional question in favor of the defendant in error, and from that decision the writ of error, now pending in this Court, was sued out.

The sole question presented here is the jurisdiction of the Circuit Court of the United States under the Removal Act, and the question is precisely similar to the jurisdictional question that would be presented had the cause been removed to the Circuit Court and by it remanded, and either of the parties had sued out a writ of error to review such ruling of the Circuit Court. Under these circumstances it is respectfully submitted that the third subdivision of the 32d rule of this court governs the case. In other words, that the provisions of rule 32nd should apply to writs of error running to the State Court when the question involved is solely that of jurisdiction. There is

no provision in the rules of this Court for a separate practice as to writs of error issued to State Supreme Courts or the Circuit Courts of the several circuits. In so far as the rules affect such writs, the provisions are common, and if it is deemed desirable and necessary for the purpose of justice to advance jurisdictional questions only arising under the provisions of the Removal Act of 1875, when such questions arise in the Circuit Courts, the same principles must undoubtedly apply to the hearing and determination of a writ of error to the State court where only the same question is raised.

To still further elaborate this view, the defendant in error respectfully suggests that this court will also consider upon this motion to advance the position of the defendant in error in this Court. His cause has been twice tried and determined upon the merits by two competent tribunals. In its decision upon the writ of error in this cause, this Court cannot consider the merits of the action; in other words, this Court is powerless to afford the defendant in error any affirmative relief of any kind, though his cause be never so just or his proceedings strictly conformable to law. If the decision of this Court shall be adverse to him, the cause can only be remanded for a re-hearing upon the question of jurisdiction, for the decision of this Court that the State court erred on that question does not necessarily or at all decide the question of the jurisdiction of the Circuit Court; so that with an adverse decision of this cause the defendant in error may be compelled to resort to the Circuit Court, take a determination there one way or the other in the question of jurisdiction, submit to a reviewal of such determination by this Court and finally come back to

the State Court to re-try upon its merits, a cause upon which the State court has already exhausted itself in two elaborate determinations.

Now, when it is considered how seriously the lapse of time necessarily involved in the procedings indicated may affect the rights of the plaintiff, his capacity to procure the necessary evidence and the distance to which the date of his cause of action will have receded; when it is considered that he has always strenuously asserted, and now insists, that he can demonstrate to this Court, upon final argument, that the proceeding for a removal, which afford the basis of this writ of error, were not only contrary to law, but were had in bad faith by the plaintiff in error; when there is to be found in the practice of this Court, and in the question to be considered in this case, no inhibition against the application of the 3rd sub-division of the 32nd rule, it seems to me that defendant is fairly warranted in pressing this motion upon the attention of the Court, and asking for a favorable determination of the same; and for the foregoing reasons defendant in error respectfully asks that the motion to advance may be granted.

C. D. O'Brien,

Attorney for Defendant in Error.

121-182

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1886

No. 977.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY CO., *Plaintiff in Error.*

vs.

CHARLES L. DUNN, by his guardian *ad litem*.

Brief for Defendant in Error.

ENOCH TOTTEN,
For Def't in Error.

C. D. O'BRIEN,
Of Counsel.

R. C. PUDKINHORN, PRINTER.

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Brief for Defendant in Error.

This is a writ of error to the supreme court of the State of Minnesota.

The defendant in error instituted his action in the state court to recover the sum of $50,000.00 damages for injuries inflicted upon him by reason of negligence and carelessness of the Railway Company on the 12th day of February, 1884. The defendant was a child about eight years old, and was on one of the passenger trains of the company, accompanied by his mother and other members of his family, on his way to the Territory of Montana, where he resides with his parents.

On the night of February 12, 1884, the train, whilst running at a high rate of speed, ran off the track, and

the car in which the child was riding was overturned; a stove in the car containing burning coals was thrown upon the defendant in error, and the door of the stove having been previously opened, and left open by one of the officers of the company, the red hot coals were thrown upon him and he was shockingly burned. His ears were burned off, his eyes burned out, and, generally, he was so severely injured that it appears to be miraculous that he survived to bring this suit: The cause was tried before a jury and a verdict was rendered for the plaintiff in that court for the sum of $50,000.00. On motion to set the verdict aside the court ordered that the amount be reduced to $25,000.00 or a new trial would be granted. Thereupon the sum of $25,000.00 was remitted and judgment was entered against the company for $25,000.00. On appeal to the supreme court of the State this judgment was affirmed, and a writ of error was then sued out, upon which the case is here.

Before the trial came on in the state court of original jurisdiction, the defendant presented its petition for the removal of the cause to the circuit court of the United States for the District of Minnesota. The petition was based on the third paragraph of section 639 of the revised statutes, usually denominated the "local influence" statute. The petition contained averments that the defendant company was a corporation of the State of Iowa; that the plaintiff was at the commencement of the action, and still was, a citizen of Minnesota, and that because of prejudice and local influence justice could not be obtained by the company in the state court. The petition was accompanied by an affidavit as required by the statute, and also by a paper, styled in the petition for

removal, a "bond," but this paper was not under seal, nor was it signed by any person or persons as "surety." By recitals in this paper it is declared to be under and for the purposes of section 639 of the revised statutes.

This petition was promptly met and traversed by a sworn statement made by the attorney for the plaintiff and filed in the cause. This statement contained positive allegations to the effect that at the time of the accident the plaintiff in the case was and ever since had been a "citizen and resident" of the Territory of Montana, and that he was domiciled there, and that these facts were "well known to the defendant" company. No evidence was presented on this issue, by either of the parties, and, upon the record thus made up, the question of the removal of the cause was brought up for hearing. The state court denied the prayer of the petitioner, and proceeded to try the cause, with the result before stated.

There is no bill of exceptions in the record; but the transcript sent up by the clerk contains what appears to be a stenographic report of what took place on the trial denominated a "settled case," together with the pleadings and proceedings which were had prior to the presentation of the petition for removal. Therefore, the sole question which is presented to this court by the record is as to the correctness of the decision of the state court in refusing to surrender its jurisdiction of the case upon the record made and presented to it as before stated. The supreme court of the State held that the decision of the trial court was right. The opinion of the court, and the dissenting opinion of two of the judges, will be found in the record. (Record, 106.)

On motion of the defendant in error, the cause was advanced under the provisions of the 32d rule, and stands for final hearing on the writ of error.

The sole question to be decided now is whether or not the State Court, on the filing of the petition for removal and the offer of the surety, was bound to surrender jurisdiction.

It is contended in behalf of the defendant in error, that the State Court cannot be ousted of jurisdiction unless the cause belongs to one of the classes of cases which the statute says may be removed. It is not enough that the petitioning party asserts, in the form prescribed by law, that the case does belong to such class; it is necessary that the case shall actually belong to some one of these classes of cases. That is the jurisdictional fact, and when the allegation, that the case is one of such a class, is denied or put in issue upon the record, the State Court is bound to inquire and determine that issue of fact.

The allegation that the plaintiff in the state court was a citizen of Minnesota, having been denied upon oath and in writing filed in the cause, the defendant in the state court was bound to make some proof to satisfy the state court that this actually was one of the "cases" mentioned in section 639 of the Revised Statutes which might be removed.

The position assumed and steadily adhered to by the defendant in error is, that whenever a petition in due form and containing the necessary averments as to citizenship is presented to the state court, together with an offer of good and sufficient surety and an affidavit stating reason for belief, and belief that, because of the existence of prejudice or local influence he is unable to obtain justice in such a court,

the state court is immediately outside of this jurisdiction, without regard to the truth of the averments as to citizenship.

To state this position a little more fully, it means that whenever a defendant to a cause in a state court asserts in due form that the plaintiff is a citizen of one State, and the defendant a citizen of another, and offers good and sufficient surety with the required affidavit of prejudice or local influence, it is immaterial, so far as the state court is concerned, whether those averments to citizenship are true or false; that the *bare assertion* or assumption of the fact is enough; that the effect of the national statute is to deprive the state court of the power of inquiry as to the truth of an allegation of a fact intended to take away its jurisdiction, and that the courts of the United States are the exclusive judges of this question. After a careful examination of these cases, I have been unable to find any case wherein this precise question has been presented and decided, and a careful examination of the language of the statute and the authorities relating thereto, leads me to the conclusion that the position assumed by the plaintiff in error is wholly untenable.

For the purposes of this case the statute upon which this proceeding was based (sec. 639, R. S.) may be thus stated:

"Any suit commenced in any state court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed, for trial, into the circuit court * * * *in the cases and in the manner* stated in this section.

* * * * * * *

"*Third.* When a suit is between a citizen of a State in which it is brought and a citizen of another State, it may be removed on the petition of the latter * * * if before or at the time of filing said petition, he makes and files in said state court an affidavit stating that he has reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in such state court.

"In order to such removal, the petitioner *in the cases aforesaid* must, at the time of filing this petition therefor, offer in said state court good and sufficient *surety* for his entering in such circuit court, on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the cause. * * * It shall thereupon be the duty of the state court to accept the *surety* and to proceed no further in the cause against the petitioner."

It seems plain from this statute that in cases wherein it is conceded that the parties, plaintiff and defendant actually are citizens of different States as mentioned in the law, the presentation to the court in proper form of the petition, the affidavit of prejudice or local influence, with the required surety, necessarily deprives the state court of jurisdiction, whether the reasons for belief in the existence of such prejudice or influence are well grounded or not, and whether or not the party so believes, or not; the fact that the *party has made and filed such an affidavit* is sufficient. But not so as to the question of citizenship. The jurisdiction of the state court may be taken away because of the actual existence of the facts and conditions called for by the statute, and for no other cause; and the jurisdiction of the circuit court can only exist by the combined operation of the citizenship required by the statute, and

the demand for a removal of the case in the manner prescribed by law. It is the actual citizenship of the parties, and not the perfunctory or wilfully false assertion of it, which gives the right of removal, if the right exist only in the particular "cases" mentioned in the statute and in none other, and it exists because the case belongs to that category, and not because *somebody says* it does. Suppose some resident of the District of Columbia, well known to be such, who had received an injury though an accident in Virginia on a train belonging to a railroad company, a citizen of Maryland, should bring an action for damages against the railroad company in a state court in Virginia, in Alexandria, and that proceedings, like those in the present case should be taken by the railroad company to secure a removal of the cause to the circuit court of the United States, and that the plaintiff and his counsel should both stand up in open court and orally, as well as in writing, upon oath, deny the truth of the averments as to the citizenship of the plaintiff. And suppose further that the presiding judge actually knew, and that every man in the court-room knew positively and beyond any doubt that the plaintiff was not a citizen of Virginia, and never had been; notwithstanding the fact that there was a palpable and glaring attempt to impose a falsehood upon the court, would it be compelled to remove the cause? Or would it be the duty or within the power of the court to immediately institute an inquiry and call for proof as to the truth of the averments of citizenship? There is nothing in the language of the statute to forbid this inquiry, and I am unable to understand why the state court should not examine the

question. This inquiry must be somewhere made when raised.

But, it is submitted, that if the state court, in such a case would be bound to shut its eyes to an allegation which it knew to be false, and blindly surrender its jurisdiction, it would amount to a mockery of the administration of justice; such a spectacle could never have been intended by the legislative power. The view of the supreme court of Minnesota on this subject are well expressed, and the reasoning in favor of the inquiry in the state court appears to be quite conclusive (see pp. 108–9). In this case it was averred by the railroad company that the plaintiff was and had been a citizen of Minnesota; the plaintiff, in effect, stood up in open court and vehemently asserted that he was not then, and never had been, a citizen of Minnesota; and further, that the defendant corporation well knew this fact. These assertions of the plaintiff below were presented to the state court by a sworn statement in due form, which was filed in the court with the record of the cause. Was the state court bound on such a showing to surrender its jurisdiction and send the case to the circuit court in order that the court might determine and declare that the proceedings for removal were a sham and a pretense, and immediately send it back? Had it been the intention of Congress that the petition, bond of securety upon their face should determine the question of jurisdiction so far as the state court is concerned, the language of the statute would undoubtedly have been that when a petition alleging such citizenship was filed, accompanied by good and sufficient surety, the cause should be instantly removed to the federal court, there to be determined

both upon the question of jurisdiction and the general record in the cause. But that is not the language of the statute. *The language is, that when the citizenship exists, and the fact of such citizenship so existing is alleged by petition, and the surety is given then and then only, the state court shall proceed no further; but transfer the cause.* That the state court should proceed to judicially examine the question, would seem to be the simplest course and the one attended with the least delay. If error should be committed by the state court it could be corrected here. It is difficult to perceive any reason why this should not have been the intention of the legislature, unless there was a suspicion entertained in the legislative mind touching the trustworthiness of state courts in general; there is nothing in the statute to indicate the existence of such a suspicion.

Section 639 of the Revised Statutes is a consolidation of the twelfth section of the judiciary act of 1789, and the removal acts of 1866 (14 Stat., 306), and 1867 (14 Stat., 588). The difference in the language of the statute, as it now appears, from what it was originally, is neither material nor substantial. This court in one of the early cases, and as long ago as 1842, declared that "under the above section (12), *it must be made to appear to the satisfaction of the state court that the defendant is an alien, or a citizen of some other State than that in which the suit is brought*, and that the matter in controversy, exclusive of costs, exceeds the sum of $500.00. *Gordon* vs. *Longest*, 16 Peters, 97; see also *Hatch* vs. *R. R. Co.*, 6 Blatchf., 105.)

In the case of *Railway Co.* vs. *Ramsey*, (22 Wall., 328), which arose on the act of 1867, this court said:

"To obtain the transfer of a suit, the party desiring it must file in the state court a petition therefor, and tender the required security. Such a petition must state facts sufficient to entitle him to have the transfer made. This cannot be done without showing that the circuit court would have jurisdiction of the suit when transferred. The one necessarily includes the other. *If upon the hearing of the petition it is sustained by the proof, the State Court can proceed no further.*"

These expressions seem to indicate that where there was a dispute, or an issue raised as to whether or not the "case" was such an one as is removable from a state to the federal court, proofs might be taken and a judicial determination had in the state court.

It will not be denied that when a petition with the other necessary papers are presented to the state court it has *some* judicial duty to perform; It must act upon the case to *some* extent and in *some* way. It certainly may determine whether the petition for removal has or has not been filed too late (*Babbitt* vs. *Clarke*, 103 U. S., 606). It may examine the surety and pass upon his sufficiency (*Fish* vs. *Railroad Co.* 6 Blatchf., 362, 392). And if it holds that the surety is good its action is final (*Cook* vs. *Sleigman*, 17 Blatchf., 459). It may pass judgment on the sufficiency of the petition (*Ex parte Wells*, 3 Woods, 128). In the case last cited the court said, (BRADLEY, J.):

"The state court is surely not bound to shut its eyes and yield to every application that comes to it. Though removal (when authorized) is a matter of right, and not of favor, yet the court must have the right to see whether the application to remove comes within the meaning of the law."

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"Holding, as we do, that a state court is not bound to surrender its jurisdiction upon a petition for removal; until at least a petition is filed, which, upon its face shows the right of the petition to the transfer, it was not error for the court to retain these causes. We would not, therefore, consider whether the Act of 1867 limits the right of removal to the citizenship of the parties at the time of the commencement of the suit, or whether the state court had the right to call upon the defendants in error, to show cause against the application."

See, also, *Ins.* vs. *Pechner* (95 U. S., 186), where this court seems to recognize the authority of the state court to "inquire further," that is, beyond the petition for removal.

Very recently it has been held by this court that a state court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer. The right of removal is statutory, and before a party can avail himself of it he must show upon the record that his is a case which comes within the provisions of the statute. The mere filing of a petition for the removal of a suit, *which is not removable*, does not work a transfer. To accomplish this the suit *must be one that may be removed*, and the petition must show a right in the petitioner to demand the removal. *Stone* vs. *South Carolina*, 117 U. S., 432.

In the case of *Koontz* vs. *Railroad* (104 U. S., 5), which was before this court on writ of error to the

highest court of the State of Virginia, a petition for removal, in due form, was seasonably presented to the state court by the railroad company; the petition contained the averment that the defendant company was a citizen of Maryland, and that the several plaintiffs were citizens of Virginia. The plaintiffs answered the petition, denying that the company was a citizen of Maryland. The state court regularly heard the issue thus raised, and adjudged it against the defendant company. Afterwards the case was tried, and resulted in a judgment against the company; and the judgment on appeal was affirmed. This court, on the hearing upon the writ of error, proceeded to review the judgment of the state court, for the purpose, apparently, of determining as to the correctness or incorrectness of its decision, but without any intimation that by the mere presentation of the petition for removal showing upon its face such a case as was removable, the state court was ousted of its jurisdiction, and left without any authority to inquire or power to act in any other way than to transfer the case to the Circuit Court. The right of the state court to inquire appears to have been directly recognized in that case.

It seems plain, both from the language of the statute and upon authority, that the state court possessed the power to make the inquiry into the truth of the averments in the removal petitition, touching the citizenship of the defendant in error.

Here was a cause which, as it appeared upon the face of the record in the state court, and as it now appears, was clearly not removable. The allegation that the defendant in error was a citizen of Minnesota was distinctly denied by a sworn traverse, filed

in the cause; proof was required to establish the allegation as to citizenship, and to overcome this denial, none was given or offered, hence, as the pleadings and record stand the fact must be held to be with the defendant in error, under the statute. The evidence taken down at the trial and sent here by the plaintiff in error abundantly establishes the fact that the defendant in error never was a citizen of Minnesota. (See opinion of state court, 110.) His father removed from Keyser, in West Virginia, in July, 1883, and went to Glendive, in the Territory of Montana, where he has ever since resided. (See 35, 32, 21.) This testimony certainly establishes the falsity of the allegation that the defendant in error was a citizen of Minnesota, and therefore leaves the claim of jurisdiction for the federal court to defend on a frivolous pretense.

If this judgment should be reversed and the cause be remanded, with directions to the state court to remove the cause to the federal court, the fact that the removal proceedings were a sham would inevitably be established there, and the circuit court would necessarily be bound to immediately remand it to the state court. There the cause would again be tried, with probably the same result; unless, indeed, this blind and mutilated child should die in the meantime, of which there is doubtless imminent danger.

It is submitted that the judgment of the Supreme Court of the State of Minnesota ought, in all things, to be affirmed.

ENOCH TOTTEN,
For Def't in Error.

C. D. O'BRIEN,
Of Counsel.

121-182

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

No. 977.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY CO., *Plaintiffs in Error*,

vs.

CHARLES L. DUNN, by his guardian *ad litem*.

Argument for Defendant in Error.

C. D. O'BRIEN
AND ENOCH TOTTEN,
For Def't in Error.

R. C. POLKINHORN, PRINTER

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Argument for Defendant in Error.

The sole question herein presented is the construction of the third subdivision of section 639 of the Revised Statutes, being the act of March 3, 1875; and the only question involved in such construction is whether or not, under the circumstances of this case, the mere filing of a petition and bond for the removal of the cause to the circuit court of the United States operated to instantly deprive the State court of further jurisdiction, and to such an extent as to render the verdict-judgment, and affirmance of such judgment in the State supreme court erroneous upon that ground alone. The circumstances of this particular cause have been heretofore adverted to, and the fact that the jurisdiction did not exist in

point of fact in the federal court has also been pointed out. We have the right, therefore, to discuss this question as it is presented by this case, and not from any theoretical point of view. It is not a question as to what the practice ought to be, it is not a question as to which practice might perhaps best subserve the general interest of justice. The question here is what rule is applicable to the facts and circumstances of the particular case at bar? And our right to an investigation of this character is based upon the fact that it is the individual rights of the parties to this litigation that is herein involved and which must be determined, and it is to them and to their affairs that the rules and procedure of the law and justice should be applied for their determination. The entire jurisdiction conferred upon the federal court under the removal acts is a limited one, resting upon the basis of the citizenship of the parties in nearly all instances. Where the citizenship does not exist there can be no jurisdiction for any purpose whatsoever; and when, by mistaken or false assertion of the existence of such jurisdiction the federal courts have been betrayed into entertaining a cause, they have at once, on discovering the fact at any stage of the cause, renounced it. In the case at bar the federal jurisdiction is asserted by the plaintiff in error under the third subdivision of section 639, which is even a greater limitation than the general removal act; for to bring the case within the provisions of the third subdivision the suit must be between a citizen of the State in which it is brought and a citizen of another State. Here, then, to vest any jurisdiction in the United States Circuit Court, the status of the parties

must, as a matter of fact, be of a kind provided for in the statute. The plaintiff must be a citizen of the State in which the suit is brought, and the defendant must be a citizen of some other State. The object and purpose of the third subdivision is obvious: The causes which led to such an enactment are a part of history, and of the recent history of our republic; and where the cause of action is of the character of the case at bar, arising in the locality in which it did, and under the circumstances which surround it, we are fully warranted in asserting that it never came fairly within the spirit of such third subdivision. In other words, that the enactment was not intended to apply to cases of this character; and while it is true that when the necessary citizenship exists in point of fact cases of this character may lie within the letter of this law, it is equally true and equally well known that they were never included within its spirit, and it was not for this class of cases or because of cases of this character that the third subdivision of section 639 was enacted.

Now this much has been said for the purpose of asserting the further position that when a cause of this character, which is foreign to the original intention and the spirit of the third subdivision, sought by a party in interest to be brought within its provisions, not because of any circumstances occurring and existing for such removal, not because the fair determination of the issues of the action or the rights of the parties require such proceeding, but simply for the purposes of delay, the chance that death or some other occurrence may intervene, materially affecting the result of the action, it is only right and

just that such party so using this statute for his individual interests, and not in furtherance of the purpose for which it was intended, should be held to a strict and fair accountability for all of his proceedings thereunder; and that he should fairly satisfy the court, wherein the question is raised, that the facts upon which he asserts the jurisdiction really, truly and actually exist; and it is respectfully reasserted that the governing and controlling principle of this case and the basis upon which a proper final determination of it shall rest, consists in the actual fact of citizenship and not in their mere assertion by either one party or the other.

Bearing this position in mind and looking at the facts and circumstances of the case upon this point from the standpoint of the position last mentioned, let us see what, if any, warrant the plaintiff in error had in the first instance for asserting, under oath, that plaintiff in this case was a citizen of the State of Minnesota, either at the time the cause of action occurred or at the time the suit was brought.

The injuries to the defendant in error occurred upon a train of the plaintiff in error while such defendant was a passenger upon such train, proceeding from the State of Virginia to the Territory of Montana. The record shows that the journey was interrupted by the accident, and the plaintiff below remained for some months in Iowa under the constant and immediate observation of the defendant company's officers and employees, and that communications to greater or less extent took place between them and the plaintiff's parents and custodians. When he was sufficiently recovered from his injuries he departed from Iowa and completed his journey

to the Territory of Montana; part of that journey was made upon the road of the defendant company, and it is fairly to be presumed that they continued their knowledge of the plaintiff's whereabouts or could have ascertained his whereabouts by a little inquiry. The action was brought in the State of Minnesota, and after issue had been joined for some time and the term at which the case was triable had actually arrived, the petition for removal under the third subdivision of section 639 was filed. That petition, as well as the affidavit of prejudice, was made by an officer of the railroad company residing at Cedar Rapids in the State of Iowa.

Now, considering this petition solely upon the allegation of citizenship, which is the essential allegation to the jurisdiction of the federal courts insisted upon by plaintiff in error, let us inquire how the plaintiff in error, its officers, employees or agents, and particularly its president who asserted the fact, obtained the knowledge necessary to enable him to verify the petition upon the point of citizenship. If he had inquired of the father, the mother, the guarian *ad litem*, or any other person who might be possessed of any information concerning the defendant in error, he would have ascertained the fact that the defendant in error was not a citizen of the State of Minnesota, and never had been. A fair examination of the record absolutely precludes the assertion that from any legitimate source could the assertion or suggestion be obtained that the plaintiff below was a citizen of the State of Minnesota. The person making this affidavit, therefore, could not have made such inquiry, for if he had, the true fact would have been disclosed to him. We are, therefore, driven to

the conclusion that the affidavit was made and the fact of citizenship asserted without any inquiry upon the subject whatever by the person verifying the affidavit. It was then a mere baseless assertion, without inquiry, knowledge or responsibility, and untrue in point of fact. Courts have never yet encouraged such methods of procedure, and no court of justice ever will encourage them. There was nothing in the *res gestæ* of the cause to advise or suggest to any one that the plaintiff below was a citizen of Minnesota. It should have been upon the conscience of the parties filing the petition for removal, to see to it that their assertions were reasonably true or were made under circumstances which would justify them in believing them to be true; and neither phase obtained in this case. And the common experience of mankind, and the ordinary common sense and knowledge with which every individual is chargeable must have advised the employees and agents of the Railroad Company, who were conducting this litigation after it arose, that there was no basis in point of fact for the assertion of citizenship.

Now, the State court was confronted with this precise view of the question which is here understood to be presented; it was asserted in that court, upon a solemn oath by one who was is in a position to have knowledge of the facts, or who was at least responsible to that court for any declarations of fact, that might be made, that the citizenship as asserted did not exist in point of fact, never had existed, and that the statements of the petition in that behalf were false, to the knowledge of the persons presenting it. In other words, that the court was being imposed

upon by a false assertion concerning its jurisdiction, deliberately and wilfully made.

Now, it must be conceded that as the cause stood then this was the position: If the citizenship as asserted by the plaintiff in error existed then the federal court had jurisdiction and the cause was properly triable before it; if the citizenship did not exist, not only was the jurisdiction of the State court unaffected but the federal tribunals were powerless in the premises to afford either protection or relief to any of the parties. To the immediate litigants in this cause the question was of vital importance; it was important that the defendant should be properly protected and have the benefit of all these rights; it was of equal importance that the plaintiff should have the opportunity to be heard in a tribunal containing the power to afford him redress if he had been injured, and the circumstances of the case made a speedy trial important at least to him; and in view of all of those facts and circumstances the State court exercised its discretion and right of self-protection by calling upon the defendant in error to furnish some evidence of the truth of the facts as to citizenship asserted in its position. This was not a denial by the State court of the right of the defendant below to remove his case if the citizenship was as he asserted it to be. The court plainly and clearly fixed the limits of its investigation. The question of local prejudice being, so to speak, a mixed question of belief upon the part of the plaintiff in error, being as may be said largely a question of judgment, was not passed upon or sought to be passed upon by the State court; but the question of citizenship being a plain, simple question of physi-

cal fact, easy of determination, dependent in this case upon no question of statutory or legal construction, but simply the fact as to the place in which a living human being abided, was one as to which the parties could not well be mistaken and which permitted easy conclusive, and simple proof; and the plaintiff in error was absolutely bound, under the circumstances of this case, as a mere matter of good faith, or even professional courtesy, to satisfy the request of the State court in this respect when it was made in the form of the order which was filed. Now, what did it do? Instead of furnishing the required scintilla of evidence by suggestion, affidavit, reassertion of its petition, or even the assertion of its counsel, it entirely abandoned its proceedings before the State court, failed to take advantage of its rights to offer additional evidence as provided by that court, and contented itself by the mere prefunctory filing of a record which had been rejected by the State court in the circuit court of the United States for the district of Minnesota, which record it has permitted to rest in the latter court from that day to this.

We invite the special attention of this court to the record of the proceedings had upon the trial of this cause in the State court in evidence of the position here taken, which is briefly that the entire intent and purpose of the plaintiff in error upon this question was to use the statutes of the United States for the removal of causes, and the practice which had grown up thereunder, for the purpose of delaying the trial of this cause and hampering and harassing the plaintiff below in his

efforts to obtain a hearing upon the injuries which he complained of.

Now, when it is remembered that the plaintiff below always denied the citizenship as alleged in the petition for removal, when it is considered that it has been proven by the record in this case and is an undisputed fact that such citizenship never did exist, when it is conceded (as it must be) that the circuit court of the United States never could have jurisdiction of this cause, the position of plaintiff below must be conceded to be the only position which he could possibly occupy. Of what avail would it have been to him to have permitted this case to proceed to a hearing in the federal court when no judgment, either for or against him, could have been sustained. It is perhaps asserted or suggested that it was his duty to have remitted the question of jurisdiction to the federal court for its determination, but that is begging another question. Such is not the statute of the United States. The language of the statute is that when the citizenship exists, and as in this case an affidavit of local prejudice is made, the cause shall be transferred; the fact of citizenship gives the federal court jurisdiction. The affidavit of local prejudice applies that jurisdiction. It exists, and the proceedings for removal simply invoke and apply it. When it does not exist in point of fact it can neither be invoked or applied; and where in point of law and fact the federal court neither had or could obtain jurisdiction for a determination of the action, they neither have or can obtain jurisdiction of the cause for the purpose of determining any fact connected there-

with, whether it be the jurisdictional fact or any other.

Under our system of jurisprudence the State courts are nowhere forbidden from examining and determining any federal question arising in any cause of which they have original jurisdiction. It is true that the United States reserves to itself its appellative or corrective power, and this is as it should be, and prevents, necessarily, any conflict of jurisdiction or of any other kind between the two systems. But the true view to be taken seems to us to be that, under our system, the State courts, in their determination of federal questions, are, to all intents and purposes, federal courts, for the reason that they are subject to the determination of this court upon such questions, the laws of the United States are equally obligatory on them, and the decisions and judgments of the United States courts are precedents which are as binding upon them, upon such questions, as the determination of their local tribunals of last resort upon all other questions. This is recognized by every State court in the United States, both of first instance and of last resort; and while it is so recognized the suggestions that a State court is incompetent to pass upon a federal question fairly arising before it, is not only repugnant to all experience and judgment, but is contrary to the well known and settled practice of the law throughout the United States.

It seems to us that if the question here presented is at all a disputed or vexed one, that the line of demarkation between the jurisdictional questions arising on the removal of causes which the state courts have the right to pass upon and those which are ex-

cluded from their cognizance by either the policy or the spirit of the two systems of jurisprudence, the comity existing between the courts or the practice necessary for the protection of a harmonious system of rulings can be easily drawn; and that this case presents the question very clearly.

If the jurisdiction of federal courts depends upon a fairly disputed question of fact upon which two tribunals of equal jurisdiction could fairly arrive at different conclusions, then the determination of the jurisdiction certainly lies with the federal court alone. If the jurisdiction depends upon a mixed question of law and fact, or upon a legal construction alone of some act, decision or enactment of Congress, or some legal condition attending the physical status of the party, then again the determination must be left to the federal court, because where there is an opportunity for a difference of opinion between the two tribunals, the federal jurisdiction alone must control: but where the question, as in this case, is a naked question of fact about which there is, and upon this record, can be no dispute; that is, where it is, as proven in this case, the absolute, ultimate, and finally established fact that the necessary citizenship never has existed, and does not exist, there is nothing for this court to pass upon, there is no jurisdiction in the Circuit Court of the United States for any purpose, either of removal or otherwise. And to illustrate this position by the actual circumstances and the record in this case, only one other allusion is necessary. If the State court had undertaken to dispute in the case at bar either the truth or *bona fides* of the affidavit of local prejudice, it would have erred. The determination of

that question was alone with the federal courts, for the reason above stated, that two tribunals acting fairly and with concurring jurisdiction might, upon a question of that character, reach different conclusions. But this case has been tried; the facts in relation to the citizenship of the parties have been determined. Issue has been joined upon it, and the plaintiff in error has left it without a scintilla or suggestion of evidence that it is otherwise than was solemnly proven in the court below by the plaintiff below. Take this record to the circuit court of the United States for the District of Minnesota; let the evidence show the status of the parties to be as it was shown on the trial below, and conclusively proven; would it be pretended that when those facts appeared the circuit court would have advanced another step in the cause? And not only that, but if a verdict and judgment had been rendered either way by the circuit court, it would have been set aside after such rendition for want of jurisdiction by the court upon its own motion. This was actually done in the case of *Carson, et al.*, plaintiff in error *vs. Tredt, et al.*, defendants in error, U. S., page . In that cause, which was removed from the State Court to the United States Circuit Court for the District of Minnesota, both plaintiffs and defendants mistakenly supposed that the federal court had jurisdiction. The cause proceeded to trial and verdict. After verdict the presiding judge, on being further apprised of the status of the parties to the case, dismissed the entire proceedings and remanded the cause to the State court for want of jurisdiction,

and this court, in the opinion above cited, sustained that decision.

The case of *Carson* vs. *Hyatt*, (118 U. S., 279), is an authority in favor of the defendant in error. In that case the State court refused to surrender jurisdiction because an answer of the petitioner, filed in the cause by her counsel, long anterior to the date of the petition, averred that she was a citizen of the State of New York, while the petition showed that she was a citizen of Massachusetts. This court held that inasmuch as the petitioner actually was, at the time, a citizen of Massachusetts, the State court was bound to transmit the cause to the circuit court, and says:

"The State court is only at liberty to inquire whether, on the *face of the record*, a case has been made which requires it to proceed no further.

"In the present case the petition stated in positive terms that Mrs. Carson was, at the beginning of the suit, and still continued to be, a citizen of Massachusetts. *With that fact established*, the necessary citizenship for a removal *existed*." (See p. 287.)

In the case under discussion, on the "*face of the record*," there is no such fact "established," on the contrary, the allegation of citizenship in the petition for removal is distinctly and positively denied on the face of the record. In the case just cited, the truth of the petition for removal was not denied, and the subsequent proceedings established the truth of the allegation of citizenship; in other words, a case for removal *actually existed*. In this case, the allegation of citizenship in the removal petition was denied, and the proof on trial, which was wholly uncontradicted, fully established the utter falsity of such allegation. In one case the face of the record dis-

closes a proper cause for removal, in the other it did not.

In none of the opinions of this court (and we have examined all of them) has this question of jurisdiction been determined in the manner which plaintiffs in error now seek to have it determined here. In no case has the judgment been reversed and the cause been remanded to the State court with directions to transmit the same to the circuit court of a proper district for trial, unless this court has affirmatively found that such circuit court would have and could exercise complete jurisdiction. If upon the record here this court should be of the opinion that the circuit court for the district of Minnesota had, or could have, such jurisdiction, the judgment below must necessarily be reversed; but unless that fairly and affirmatively appears from the record, or the plaintiff in error can satisfy this court that such is the fact, it is not believed that the court will reverse the judgment of the supreme court of the State of Minnesota, and that of the district of Ramsey County, for the sole purpose of having the latter tribunal transfer this cause to the United States Circuit Court for that district for the sole purpose of having such circuit court remand the cause back to the State court for re-trial and re-determination. The dignity of the federal tribunals requires no such vindication. Both state and federal tribunals are engaged in the common occupation of performing their office in the administration of justice and their part in the government of the citizens of this Republic. The individual rights of the meanest suitor are as sacredly guarded and preserved as those of their more fortu-

nate fellows, and no pride of opinion, technical construction, or general rule of practice, will be allowed to conflict for a moment with the substantial and secured rights of a party litigant, no matter how humble he may be. The protection of our laws against injuries or oppression, the application of legal remedies for grievances actually endured, the ascertainment and determination of the respective rights of parties, are the common objects of all the tribunals that have been alluded to; and that that protection shall be afforded and those remedies applied in the most speedy, effectual, and simple manner conformable to the laws, is the birthright of every American citizen.

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